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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
APR 16 1971
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

October Term, 1970

No. 1569

Fibreboard Corporation,
Petitioner,

vs.

National Labor Relations Board, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1971

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UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD*

Case 20-CA-1682

FIBREBOARD PAPER PRODUCTS CORPORATION

and

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO; and UNITED STEELWORKERS OF AMERICA, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On May 23, 1968, Trial Examiner Henry S. Sahm issued his Trial Examiner's Backpay Decision, attached hereto, finding that specific amounts of backpay be awarded to certain employees of the Respondent.[1] Thereafter, the

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*The decisions of the National Labor Relations Board and the Trial Examiner are each very substantial in length. For this reason, and to serve the Court's convenience, the Clerk has agreed that only the portions of these decisions pertinent to the issues presented to this Court need be printed in this Appendix. The entirety of the decisions of the Board and Trial Examiner are available to the Court in the Appendix prepared for the Court below, copies of which have been filed herein by the Clerk of that Court. The references in the Petition to portions of the Appendix ("A.") are to the latter Appendix, not to this one.

1. On March 27, 1961, the Board issued a Decision and Order, 130 NLRB 1558, finding that Respondent had not committed unfair labor practices within the meaning of 8(a)(1), (3), and (5) of the Act and sustaining the Trial Examiner's dismissal of the complaint. The Charging Parties' petition for reconsideration was granted by the Board and on September 13, 1962, the Board issued a Supplemental Decision and Order, 138 NLRB 550, in which it found that "Respondent violated Section 8(a)(5) by unilaterally subcontracting its maintenance work without bargaining with the Charging Unions over its decision to do so." The Supplemental Decision and Order did not modify the original decision with respect to the dismissal of the charges under Section 8(a)(1) and 8(a)(3) of the Act.

On July 3, 1963, (322 F.2d 411) the Court of Appeals for the District of Columbia Circuit granted the Board's petition for enforcement. The Supreme Court, on December 14, 1964, affirmed the judgment of the Court of Appeals, holding that Respondent was obligated to bargain and that the Board's order was within its power to fashion remedies (379 U.S. 203).

Respondent, the Charging Parties, and the General Counsel filed exceptions to the Trial Examiner's Backpay Decision with briefs in support thereof; the Respondent filed a brief in answer to the exceptions of the General Counsel and the Union; the General Counsel filed a brief in answer to Respondent's exceptions, and the Union filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Backpay Decision, the exceptions, the briefs, and the answering briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent that they are consistent herewith.

(1) The Charging Party (hereinafter referred to as Local 1304 or the Union) excepts to the wage formula found applicable by the Trial Examiner for computing the terminated employees' gross backpay during the backpay period, September 14, 1962 to January 18, 1965.[2] We find merit in the Union's exceptions.

The Local 1304 maintenance machinists were terminated on August 1, 1959; the collective-bargaining agreement between Respondent and Local 1304 had expired at midnight July 31, 1959. According to the provisions of that collective-

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2. The Board's Supplemental Decision (138 NLRB 550) limited backpay to earnings which might have been received from and after the date of the Supplemental Decision, September 13, 1962, rather than from the date of the employees' termination, August 1, 1959. The period August 1, 1959, to September 14, 1962, is referred to as the hiatus period.

bargaining agreement the machinists' wage rates were determined by the so-called "Pabco Wage Formula" (hereinafter "Pabco formula") which established the unit employees rate at "one dollar per day (or 12.5 cents per hour) less than the prevailing Building and Construction Crafts Scale" (construction millwrights).[3] The "Pabco formula", first embodied in the collective-bargaining agreement effective August 1, 1951, was incorporated in each succeeding agreement through July 31, 1959. The ILWU millwrights employed by Respondent received the same wage rates as the terminated machinists from July 1946 to July 31, 1959; the ILWU millwrights' wage rates were not independently established, but were determined by Local 1304's collective bargaining agreement in automatic fashion.[4] After the Union machinists were terminated, the ILWU millwrights, of which there were apparently only 2, continued to work and, in fact, replaced the machinists in the felt mill; however, they received no wage increase until 1961, when it was agreed that they would receive the increases set forth in the collective bargaining agreement between the Respondent

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3. The terms "building trades millwrights", "building and construction crafts" and "construction millwrights" are used interchangeably herein.

At the time of termination the machinists were receiving $3.525 per hour under the "Pabco formula." The hourly rates payable under the "Pabco formula" during the backpay period would have been: September 14, 1962, to July 31, 1963—$4.275; August 1, 1963, to January 18, 1965—$4.505.

4. According to Burke, the ILWU business agent, the ILWU millwrights "waited until [Local] 1304 . . . settled their negotiations and then adjustments were automatically passed on to our group under our contract . . . [I]t was just a matter of processing through payrolls, it was automatic."

and the ILWU production employees.[5] Upon the machinists' termination the Respondent contracted out the maintenance work to an independent contractor, which employed millwrights and paid them the building trades or construction millwright wage rates.[6]

The Trial Examiner rejected the "Pabco formula" and found that the wage rates received by the ILWU millwrights should be utilized in computing the gross backpay of the terminated machinists. In excepting, the Union contends that the "Pabco formula" is the most reasonable and objective criterion for computing the machinists' backpay, since it had appeared in every contract between the parties from 1951 to 1959 and is reasonably close to the wage rates received by the employees of the independent contractor, who replaced the terminated machinists. Moreover, it contends that Respondent has failed to show with reasonable cer-

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5. The Respondent had collective-bargaining agreements with the ILWU production workers; these agreements did not include the ILWU millwrights until 1961.

During the backpay period the ILWU millwrights received the following hourly rates; September 1962 to May 31, 1963—$3.695; June 1, 1963 to May 31, 1964—$3.795; June 1, 1964 to May 31, 1965—$3.895. Beginning June 1, 1965, they received $3.985 per hour.

6. These hourly rates were:
Effective June 16, 1959—$3.76
Effective June 16, 1960—$3.945
Effective June 16, 1961—$4.18
Effective June 16, 1962—$4.40
Effective June 16, 1963—$4.63
Effective June 16, 1965—$4.925

It should be noted that these rates (building trades or construction millwrights) are the same rates upon which the "Pabco formula" was based. Thus, if the machinists had not been terminated and the "Pabco formula" had remained in their contract with Respondent, the machinists actually would have been receiving 12.5 cents per hour less than the independent contractor's employees who replaced them received.

tainty that if it had not been for Respondent's unlawful act, different wage rates would have been negotiated for the 1962 to 1965 backpay period.

The Board's function in this proceeding is to determine the amount of backpay that will, as nearly as possible, make the unlawfully terminated employees whole. This is not always an easy task. For as the Eighth Circuit pointed in *N.L.R.B. v. Brown & Root, Inc.*:[7]

> Obviously, in many cases it is difficult for the Board to determine precisely the amount of backpay which should be awarded to an employee. In such circumstances the Board may use as close approximation as possible, and may adopt the formula reasonably designed to produce such approximations . . . .

In our opinion, the circumstances herein permit only reasonable approximation. We also emphasize that any uncertainty must be resolved against the wrongdoer whose conduct made certainty impossible.[8]

The Trial Examiner correctly found the following principle of law applicable to this case: "Loss of earnings of backpay claimants should be measured by the earnings of their *replacements* or comparable employees" (emphasis supplied). In finding that the rates of the ILWU millwrights are the best measure of what the terminated machinists would have received, the Trial Examiner emphasized that the ILWU millwrights performed work requiring skills comparable to the terminated machinists. He did not consider, however, the wage rates of the independent contractor's employees who actually replaced the terminated machinists on 19 of the 21 jobs he found available during

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7. 311 F.2d 447, 452 (C.A. 8).

8. See *Ozark Hardwood Co.*, 119 NLRB 1130 enfd. 282 F.2d 1, (C.A. 1); *N.L.R.B. v. Miami Coca-Cola Co.*, 260 F.2d 569 (C.A. 5).

the backpay period. Presumably the failure to consider the replacements' wage rates resulted from the fact that he erred with respect to the hourly rates received by the independent contractor's employees since he found that their hourly rate was $4.00 in January 1965, or about the same rate as the ILWU millwrights. In fact, the independent contractor's millwrights were receiving $4.63 in January, 1965.[9] Having erroneously found that the wage rate of the replacements of the backpay claimants was $4.00, the Trial Examiner concluded that it would be contrary to precedent to utilize the "Pabco formula", which would have provided substantially higher wage rates, because gross backpay "should be measured by the earnings of [the backpay claimants'] replacements or comparable employees." However, since the independent contractor's employees who replaced the terminated machinists on 19 of the 21 jobs found available by the Trial Examiner, in fact, received higher rates than the "Pabco formula" would have provided, utilization of the "Pabco formula" presents no conflict with precedent.

In finding the ILWU millwright rates the best measure to determine gross backpay, the Trial Examiner also emphasized that the ILWU millwrights had received the same

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9. The Respondent contends that the Trial Examiner did not err with respect to the rates of the independent contractor, but that the Trial Examiner's reference to a $4.00 rate was, in fact, a reference to the comparative wage cost to Respondent of employing the independent contractor. Although the Trial Examiner's rather ambiguous footnote (No. 23) appears to lend some support to the Respondent's contention, in our opinion, it is not sufficient to overcome the fact that the Trial Examiner found that in January, 1965, "the independent contractor's employees received $4.00." Therefore, we can only assume the Trial Examiner was in error with respect to this finding.

rates as the terminated machinists for 13 years.[10] But he overlooked the fact that historically the ILWU millwrights' wage rates had followed the terminated machinists' rates in an automatic fashion. After August 1, 1959, the ILWU millwrights, of which there were apparently only 2, for one reason or another (be it neglect of their bargaining agent, the fear that they also might be terminated, the realization, as suggested by the Trial Examiner, that their rates were excessive, or just confusion) neither bargained for nor received a wage increase until 1961. From this fact the Trial Examiner concluded that "it is not too unreasonable to assume that they (the ILWU millwrights) recognized the soundness of Fibreboard's claim that the terminated machinists' wage rates under the Pabco formula . . . were too high." To the contrary, it seems just as reasonable, if not more reasonable, to assume that the ILWU millwrights realized that if they requested higher wage rates they might follow in the footsteps of the terminated machinists. In our opinion, if we accept the ILWU millwrights' rates as the backpay period wage rates, we are placed in the rather anomalous position of finding that the backpay claimants' rates should be determined by a control group

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10. The Trial Examiner attempts to bolster his support for the ILWU millwrights' rates by arguing that the rates paid by other employers with whom the Union had contracts should be considered. He points out that the contract of Foremost Food and Chemical provides the highest rates and that the Foremost rate is approximately the same as the ILWU millwrights received during the backpay period. The simple answer to the Trial Examiner's argument, however, is that prior to 1959, Respondent had voluntarily negotiated contracts with the Union which contained rates significantly higher than those paid by Foremost or the other employers with whom the Union had contracts. Thus, in January 1958, the Foremost rate was $2.93 and the Fibreboard rate was $3.375; in January 1959, the Foremost rate was $3.04, and the Fibreboard rate was $3.525. Therefore, unlike the Trial Examiner, we see no reason to attach any significance to wage rates included in contracts negotiated by the Union with any other employer.

(the ILWU millwrights) whose wage rate had previously followed their own, and who, for almost a 3-year period, might not have requested or received a wage increase precisely because of the Respondent's unlawful termination of the backpay claimants.

But the fact deemed most significant by the Trial Examiner in rejecting the "Pabco formula" is that if the "Pabco formula" were adopted, the backpay claimants would receive higher wage rates during the backpay period than the rate the Union eventually agreed to upon their return to work. The Trial Examiner was of the opinion that such a result would be not only specious but strange.

The terminated machinists returned to work in March 1965, at $3.74 per hour "pending negotiations". In July 1965, Local 1304 and the Respondent executed a collective-bargaining agreement which provided a $4.00 wage rate. While we agree that a subsequently negotiated wage rate is one factor to be considered in determining a wage rate applicable to the backpay period, we do not agree that it is the controlling factor. Moreover, it appears necessary to consider the Union's bargaining position in 1965. The negotiations matched a Union weakened by 6 years off the job, without a majority of the former employees back in the plant, against a Respondent determined to preserve the savings it had achieved through its unlawful contracting-out. In addition, the Respondent made it clear that it considered that its only obligation was to talk.[11] In this

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11. Thus, R. C. Thurmann, Respondent's director of industrial relations candidly admitted:

> The very first meeting that I held with 1304 I reviewed with them where we were and that if we had only known back in '59 that we were supposed to do some talking before our minds were made up, why we would have gone through that motion and I said now we are going through that motion now and as you understand fully that we are only obliged to discuss this matter with you and then if we find that we cannot work it out to our satisfaction, we are at liberty to continue on with our contracting.

situation the Union had been warned by its counsel to avoid an impasse at all cost. In the circumstances of this case, we do not believe that the wage rates that resulted from the 1965 bargaining should be considered a controlling factor in the determination of the backpay wage rates.

But, the Respondent contends the Union had the same bargaining weaknesses in 1959 as it did in 1965. Stressing, as did the Trial Examiner, that its decision to subcontract the maintenance work was economically motivated and justified, the Respondent assumes as a foregone conclusion that had bargaining occurred in 1959, the "Pabco formula" would have been eliminated or the maintenance work subcontracted, and contends that the Trial Examiner's finding merely constitutes an attempt to apply the wage rates which in all probability would have resulted from bargaining in 1959.

In its Answering Brief the Respondent states:

> But to assume as does the Union that bargaining in 1959 would have resulted in abandonment by Fibreboard of its plans to contract out the work, and in renewal in that and subsequent years of the old contract and its wage formula is to ignore the fact that this is exactly what Fibreboard refused to do and that it made its refusal stick.

The simple answer to this assertion is that Respondent did not negotiate reduced wage rates in 1959 and that it made its refusal "stick" because it refused to bargain over its decision to subcontract, and that this refusal was precisely the gravamen of its unfair labor practice as found by the Board, the D.C. Circuit Court of Appeals, and the Supreme Court.

For as the Supreme Court said:

> The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from the independent contractor that economies could be derived by reducing the work force, decreasing fringe benefits and eliminating overtime payments. These have long been regarded as matters particularly suitable for resolution within the collective bargaining framework. . . . Yet it contended that when an employer can effect cost savings in these respects by contracting the work out, there is no need to attempt similar economies through negotiations with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded on the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiations.

In the words of the Supreme Court, "it is not possible to say whether a satisfactory solution could [have been] reached . . ." Indeed, as the Respondent contends, the Union might not have been able to persuade the Respondent not to contract-out or retain the "Pabco formula". On the other hand, it is by no means clear that the parties could not have reached an agreement in 1959 which would not have eliminated the "Pabco formula". The fact that the Respondent did not give the Union an opportunity to attempt to reach such an agreement was found violative of the Act. Thus, any uncertainty with respect to what wage rates the backpay claimants would have received except for termination was created by the Respondent, which bears the risk of that uncertainty.

In the circumstances of this case we are of the opinion that the "Pabco formula" provides the most reasonable, acceptable, and objective approximation of what the backpay claimants would have received. Accordingly, we find that the gross backpay of the terminated machinists for the backpay period beginning September 14, 1962, ending January 18, 1965, be computed on the basis of the "Pabco Wage Formula".[12]

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(5) We agree with the Trial Examiner's finding that interest be paid on the net backpay from September 14, 1962.

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(8) The Trial Examiner found that terminated machinists David Arca and Lincoln Beck forfeited their right to reinstatement and backpay because of their picket line misconduct in August, 1959. The Trial Examiner further found that the picket line activity engaged in by Carl Olson in August 1959, did not warrant denying him reinstatement and backpay.

The Respondent excepts to the Trial Examiner's finding that Olson's conduct did not warrant forfeiture of his backpay and reinstatement rights. The General Counsel and the Union except to the finding that Arca and Beck be denied reinstatement and backpay, contending that the Trial Examiner should not have reached the issue whether Arca, Beck, and Olson were subject to forfeiture of backpay and reinstatement, because the Respondent's defense of picket line misconduct with respect to these employees was not timely raised ("barred by laches"). In the alternative, they contend that the conduct of Arca and Beck does not warrant

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12. These hourly rates are:
September 14, 1962 to July 31, 1963—$4.275
August 1, 1963 to January 18, 1965—$4.505

forfeiture of backpay and reinstatement rights; they agree with the Trial Examiner's finding with respect to Olson.

We find it unnecessary to decide whether the alleged picket line misconduct of Arca, Beck, and Olson would, in other circumstances, have warranted forfeiture of their backpay and reinstatement rights, as we agree with the contention of the General Counsel and the Union that Respondent's defense with respect to picket line misconduct was not timely raised.[37]

The alleged misconduct of Arca, Beck, and Olson involved picket-line incidents that occurred in August 1959, more than a month prior to the original unfair labor practice hearing. The Respondent does not contend that it had no knowledge of the alleged misconduct; in fact, it had litigated the matter of alleged misconduct in the Alameda County Superior Court from August 24 to September 11, 1959, which was before the Board's unfair labor practice hearing, held on September 21 and 22, 1959.

It should be noted that the General Counsel's Complaint of September 2, 1959, alleged the discharge of the Respondent's maintenance employees, represented by the Union, as violative of Section 8(a)(3) as well as Section 8(a)(5) of the Act.[38] The Trial Examiner on November 27, 1959, rec-

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37. At the backpay hearing, the General Counsel objected to the receipt of any evidence (oral or documentary) concerning the alleged picket line misconduct of Arca, Beck and Olson; these objections were overruled. The contention that the Respondent's defense to the reinstatement and backpay rights of these backpay claimants could not be raised at this stage of the procedings was renewed by the General Counsel in his brief to the Trial Examiner. Nevertheless, the Trial Examiner did not mention the contention in his Decision.

Member Zagoria would adopt the Trial Examiner's findings as to Arca and Beck.

38. In view of this fact, the Respondent's contention that this case should be contrasted to cases arising under Section 8(a)(1) and 8(a)(3) appears to be without substance.

ommended that the complaint be dismissed in its entirety.[39] On March 27, 1961, the Board sustained the Trial Examiner's findings (130 NLRB 1558) and dismissed the complaint. After the Union's May 11, 1961 petition for reconsideration was granted by the Board, the Respondent, on July 11, 1962, filed a petition to reopen the record for the introduction of testimony relating to the reduction of its maintenance department work force; that petition made no reference to picket-line misconduct of terminated employes.

The Respondent's petition to reopen the record was denied (138 NLRB 550, footnote 2) on the grounds that the matter was one "more properly treated at the compliance stage of the proceedings." The Respondent contends that had it moved that the record be reopened to present evidence that certain employees had disqualified themselves from reinstatement and backpay the Board's answer would have been the same. The Respondent would thus equate the diminution of jobs, wage rates, and failure to exercise due diligence in seeking other work during the backpay period with the issue of disqualification for misconduct or "cause". We do not agree with the Respondent's contention, for the former issues are properly matters for compliance in that they go to the issue of the amount of Respondent's liability

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39. The Alameda County Superior Court issued its findings of fact and conclusions of law on October 7, 1959 (the decision and judgment were not rendered by the Court until December 2, 1959), which was before the parties had filed briefs with the Trial Examiner in the unfair labor practice proceeding. However, the Respondent did not raise the issue of picket-line misconduct in its brief to the Trial Examiner, request that the Court's findings be made part of the record, or request that the record be reopened to receive evidence in this matter.

or damages, whereas the latter issue goes to the remedy itself (the *right* to reinstatement).[40]

Moreover, the Respondent fails to consider that unlike the defense of disqualification for misconduct, the question of diminution of jobs cannot be considered with any finality until an offer to reinstate has been made and accepted, and the backpay period is thereby established. The issue of disqualification for misconduct, however, can be determined with finality in the original proceding (providing the facts were then known) and is not dependent on the establishment of the backpay period, or the changing nature of Respondent's business. Thus, the issue of employee misconduct ("cause") which warrants forfeiture of backpay and reinstatement goes to the remedy and not to the issue of compliance with the remedy.

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40. For example, if the defense of diminution of jobs is raised, the *right* to reinstatement and backpay of the employee involved is not in question, rather, the issue is whether the Respondent is able to comply (i.e., whether the employee's former or a substantially equivalent position is available). If an employee's position is at first unavaliable but later becomes available, the employee remains entitled to it. On the other hand, when an employee is denied reinstatement and backpay for "cause" (misconduct) he has no right to reinstatement or backpay whether his former position is available or not. In this connection see *John F. Cuneo Co.*, 152 NLRB 929, where the Trial Examiner found that an employee had been unlawfully discharged but refused to receive the Respondent's evidence attempting to prove that reinstatement should be denied because the employee had disqualified himself for reinstatement. The Board affirmed the finding that the discharge was unlawful, but remanded the proceeding to the Trial Examiner for determination of the employee's suitability for reinstatement because the determination of that issue at the unfair labor practice hearing was material to the appropriateness of the usual remedy of reinstatement and backpay. See also *I. Posner, Inc.*, 133 NLRB 1567, footnote 1.

We must also consider the effect, if any, of the Court's decree enforcing the Board's order.[41] Although we have found no case directly in point, an examination of the cases indicates that the courts look with disfavor on belated attempts to assert misconduct defenses to the reinstatement remedy as opposed to defenses which go to the amount of the Respondent's backpay liability which the courts consider to be questions within the Board's special competence.[42]

In *N.L.R.B. v. Mastro Plastics Corporation,* 261 F.2d 147, (C.A. 2), the employer, which had been ordered to reinstate a number of unlawfully discharged employees, refused to reinstate one of them because she had been convicted of disorderly conduct on the picket-line, both the conduct and the conviction having occurred before the unfair labor practice hearing. The Second Circuit held (at 148):

> Although the discharge and reinstatement of these employees were the 'central' issues in dispute, Mastro never asserted the improper conduct of Yolanda Flamio or her disorderly conduct convictions as a ground for not reinstating her. No valid reason has been offered by respondents to excuse their failure to raise the conviction issue before the Trial Examiner. Their failure

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41. The Board's Supplemental Decision and Order was upheld by both the Court of Appeals for the D.C. Circuit (322 F.2d 411) and the Supreme Court (379 U.S. 203). The Supreme Court held that the Board's Order was within its power to fashion remedies, ". . . when the loss of employment stems directly from an unfair labor practice as in the case at hand." The Board's order is clear and unequivocal as to reinstatement:

"The . . . Board orders that . . . Fibreboard . . . offer to those employees [represented by the Union] immediate and full reinstatement to their former or substantially equivalent positions . . . ."

42. See *N.L.R.B. v. Kohler Co.,* 351 F.2d 798 at 801, (C.A. D.C.). See also *Wallace Corp. v. N.L.R.B.,* 159 F.2d 952 (C.A. 4); *N.L.R.B. v. Bird Machine Co.,* 174 F.2d 404 (C.A. 1).

> to assert the conviction before the Board would itself have precluded them from asserting it here in 1954, 29 U.S.C.A. [Section] 160 (e), and necessarily prevents such assertion now.

Mastro was adjudged guilty of contempt and required to offer reinstatement to the employee to purge itself.[43]

Likewise, the Fifth Circuit declined to remand a case to the Board to consider evidence of alleged union misconduct during a strike (which conduct had been raised as a defense to the unfair labor practice), on the issue of reinstatement of strikers, because there had been, ". . . no proper offer of specific and relevant proof on the reinstatement issue," at the unfair labor practice hearing to show the strikers were engaged in such misconduct. The Board's order was enforced.[44]

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43. The Respondent would distinguish *Mastro Plastics* since the contempt convictions, in the instant case, were not handed down until more than 2 months after the close of the unfair labor practice hearing. In our opinion this alleged distinction is without merit, for as the court pointed out, "Mastro never asserted the *improper conduct . . . or* her disorderly conduct conviction as a ground for not reinstating her." [emphasis added]. The court's language indicates that the defense would not have been barred if either the improper conduct or the conviction had been asserted in the original proceeding. Moreover, it should be noted that both the Board and the courts have indicated that a contempt conviction for violation of a state court injunction is not controlling or dispositive on the question of whether employees should be reinstated. (see *N.L.R.B. v. Cambria Clay Products Co.*, 215 F.2d 48, (C.A. 6); *J. H. Rutter-Rex Mfg. Co., Inc.*, 158 NLRB 1414 at 1419 footnote 8).

44. *N.L.R.B. v. Lambert, d/b/a Sue-Ann Mfg. Co.*, 211 F.2d 91 (C.A. 5). The Respondent, however, citing *Elmira Machine and Specialty Works, Inc.*, 148 NLRB 1695, contends that if the Board finds the misconduct defense barred, its finding will be contrary to its own precedent.

In our opinion, *Elmira* is distinguishable from the instant case on at least 2 grounds: First, there is no indication that the impropriety of considering misconduct of reinstated employees in the backpay proceeding was asserted; neither the General Counsel nor the union filed exceptions to the Trial Examiner's Supplemental Decision. Therefore, the Board did not pass on the issue.

Secondly, in *Elmira* there was not an intervening Court decree enforcing the Board's reinstatement order as in the instant case.

It therefore appears that the Court decree enforcing the Board's order that the terminated machinists be offered reinstatement precludes our consideration of the misconduct defense at this stage of the proceeding.

The Respondent could have raised the alleged misconduct at the hearing held on September 21 and 22, 1959, just a month after the alleged occurrence. Respondent could have petitioned the Board to reopen the record to receive the evidence at any time up to the presentation of the case to the Court of Appeals, as provided in Section 10(c) of the Act. Likewise, at any time before the Court of Appeals decision on July 3, 1963, Respondent could have applied for a remand to the Board to hear this evidence, pursuant to Section 10(c) of the Act. In our opinion, the misconduct defense based on facts of which the Respondent had knowledge in August 1959, has been raised too late to be now considered by the Board as a ground for barring reinstatement and cannot be asserted as a bar in this backpay proceeding, the purpose of which is to determine the amounts of backpay due Arca, Beck, Olson[45] and the other terminated machinists.

Justice Frankfurter, in *N.L.R.B.* v. *Donnelly Garment Co.*, 330 U.S. 219, succinctly stated the principle involved:

> Due process does not afford a party the right to treat as a dress rehearsal a hearing on the issues for which the hearing was adequate. And the Wagner Act does not require that ground be covered a second time, or piecemeal.

45. Olson was not offered reinstatement by Respondent. The Trial Examiner computed Olson's backpay to June 30, 1967, apparently the date upon which the Trial Examiner thought Olson's job was eliminated. However, the parties stipulated that Olson's job was eliminated on October 21, 1967, and not June 30. Accordingly, we have computed Olson's backpay to the date his job was eliminated, October 21, 1967.

Accordingly, we find that backpay claimants Arca[46] and Beck are entitled to reinstatement.[47]

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46. The General Counsel contends, and we agree, that the backpay period for Arca and Beck still continues and will continue until such time as the Respondent extends to them an adequate offer of reinstatement.

The Trial Examiner erroneously found that there was no dispute as to the average base-period quarterly earnings of the machinists since there is such a dispute with respect to the average quarterly earnings of David Arca. Arca was on leave of absence to attend to union business for 8.8 weeks during the base period (August 4, 1958 to July 31, 1959). The General Counsel, as he did with all other employees who did not work a full year during the base period, projected Arca's average quarterly earnings during a full year. He arrived at average quarterly earnings of $2,045.19 for Arca. The Respondent, although it conceded the correctness of such projections made as to other employees, objects to such a projection in the case of Arca. We find the method employed by the General Counsel to be a reasonable means for determining average base-period quarterly earnings, and that it is just as reasonable for Arca as it is for the other employees. We have, therefore, calculated Arca's backpay on the basis of $2,045.19 average base-period quarterly earnings.

47. Contrary to the General Counsel's contention, we find that the hourly wage rates set forth in the collective bargaining agreement between the Respondent and the Union, effective July 15, 1965, retroactive to March 22, 1965, and not the "Pabco formula" should be applied in computing the backpay of Arca, Beck and Olson after March 22, 1965.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Fibreboard Paper Products Corporation, its officers, agents, successors, and assigns shall make the employees involved in this proceeding whole by payment to them in the following amounts:

	Name	Back Pay Due
	Machinists	
1.	Nash, Lloyd J. (see Appendix)	$ 1,272.71
2.	Jackson, Warren C.	8,217.48
3.	Beck, Lincoln E. (see Appendix)	27,850.39
4.	Wittorff, Detlif C.	5,529.70
5.	Crispino, Manuel (see Appendix)	318.57
6.	Hamidy, Robert (see Appendix)	1,722.49
7.	Cruze, Joseph S.	10,752.27
8.	Johnson, Fred Clarence	19,293.91
9.	Schlotterbeck, Eugene	9,782.66
10.	Bennett, Florin F. (see Appendix)	62.96
11.	Schoenfeld, Milton H. (see Appendix)	5,546.32
12.	Arca, David (see Appendix)	6,704.69
13.	Goranson, George W.	4,830.68
14.	Jensen, Raymond D.	16,792.36
15.	Longnecker, Joe E.	8,906.63
16.	Bradford, Harry C.	8,062.19
17.	Fusare, Alex J.	8,661.34
18.	Price, Joe	22,230.90
19.	Cunningham, Harry L.	12,093.51
20.	Raineri, Louis C.	21,688.93
21.	Reihl, William W.	6,671.27
22.	O'Leary, Vincent John[54]	7,986.24
23.	Fontes, Clifford L.[55]	3,086.78
24.	Lippert, Donald W.[56]	8,895.02
25.	Vanderbeck, Joseph P.[57] (see Appendix)	6,691.99
26.	Weismiller, Jr. Gerald[58] (see Appendix)	3,575.64

Power House Employees

27.	Lowell, Fredric Lincoln (see Appendix)	$ 5,851.83
28.	Hughes, Robert Edgar (see Appendix)	18,082.36
29.	Haueter, Herbert F.	11,044.87
30.	Johnson, Elmer T. (see Appendix)	18,305.72
31.	Novacek, George R.	7,326.95
32.	Olson, Carl W. (see Appendix)	12,615.70
33.	Giffin, John L. (see Appendix)	3,209.82
34.	Mann, Eugene G.	7,819.12
35.	Van Zoen, Jacque J.	3,892.18
36.	Wall, James R.	5,555.77
		$330,931.95

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54. The opening for O'Leary was created by the fact that Crispino was disabled from prior to the commencement of the backpay period until his compulsory retirement date (10/1/62).

55. The opening for Fontes was created by the fact that Bennett was disabled from prior to the commencement of the backpay period until his compulsory retirement date (12/1/62).

56. The opening for Lippert was created by the fact that Cruze was disabled from prior to the commencement of the backpay period until Hamidy's retirement date (12/1/62). Thus, Lippert would have replaced Cruze from 9/14/62 to 12/1/62 and Hamidy thereafter.

57. The opening for Vanderbeck was created by Cruze's continued disability from 12/1/62 (Hamidy's retirement date) until 4/1/63, Wittorff's retirement date. Thus, Vanderbeck would have replaced Lippert (who replaced Cruze from 9/14/62 to 12/1/62 and then Hamidy, whose retirement date was 12/1/62) for the disabled Cruze from 12/1/62 to 4/1/63 and then Wittorff whose retirement date was 4/1/63 for the remainder of the backpay period.

58. The first opening for Weismiller was created by Cruze's continued disability from 4/1/63 (the date Vanderbeck would have become eligible for the retiring Wittorff's job) to 4/15/63 when Cruze would have returned to work. The second opening was created when Nash reached his compulsory retirement date on 3/1/64.

With respect to those employees whose backpay is still accruing,[59] as found herein, payment to them of the amount found to be due and accruing constitutes satisfaction of Respondent's obligation only up to the date set forth in the Appendix, which is the end of the period covered by the backpay specification.

Dated, Washington, D.C., Dec 15 1969

Frank W. McCulloch, Chairman

John H. Fanning, Member

Sam Zagoria, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

[The Appendix to the Board's Supplemental Decision and Order, consisting of nine pages, has not been printed in this Appendix.]

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59. David Arca and Lincoln Beck.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners
Branch Office
San Francisco, California

Case No. 20-CA-1682

FIBREBOARD PAPER PRODUCTS CORPORATION

and

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO; and UNITED STEELWORKERS OF AMERICA, AFL-CIO

[List of Counsel Omitted]

Before: HENRY S. SAHM, Trial Examiner

TRIAL EXAMINER'S BACKPAY DECISION[1]

History of Proceedings

The Company and the Union have had a history of collective bargaining dating from 1937.[2] The last of these con-

1. The transcript of the hearing is hereby corrected in accordance with the parties' joint motion dated February 19, 1968.

2. The Company is referred to interchangeably herein as Respondent and Fibreboard and the Union also as Local 1304.

tracts expired on July 31, 1959. Between 1954 and 1956 the Respondent Company had under consideration the feasibility of contracting out its maintenance work as a measure of effecting plant economies. The study was renewed in June 1959. As a result of the renewed study, Respondent let out its maintenance work to an independent contractor and terminated 53 of its maintenance employees. The Union then initiated proceedings and the Board found the Company to have committed an unfair labor practice within the meaning of Section 8(a)(5) of the National Labor Relations Act, herein called the Act,[3] and ordered the Company to reinstitute the maintenance operation performed by the employees represented by the Union and to reinstate the employees to their former or substantially equivalent positions with backpay computed from the date of the Board's supplemental decision to the date of the Company's offer of reinstatement to the terminated employees.[4] On appeal, the Court of Appeals for the District of Columbia granted the Board's petition for enforcement, 322 F.2d 411. The decision was affirmed by the Supreme Court, 379 U.S. 203, 85 S.Ct. 441, on December 14, 1964.

A controversy then arose over the amount of backpay due the terminated employees. The General Counsel claimed $378,545; the Respondent Company, $118,136. Thereafter, the Regional Director for the Twentieth Region on August 17, 1967, issued backpay specifications for the purpose of

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3. The Board in its original decision (130 NLRB 1558) dismissed the complaint but upon reconsideration it found the Respondent had violated the Act and ordered reinstatement and backpay for the terminated employees (138 NLRB 550).

4. 138 NLRB 550. The Board limited backpay to earnings which might have been received from and after the Board's final order in its supplemental decision and not from the date the Company terminated the employment nor from the date of the original decision.

determining the amount of backpay, if any, due to these terminated employees. Respondent thereupon filed an answer which was subsequently amended on October 13, 1967. Hearings were held after prehearing proceedings before Trial Examiner Henry S. Sahm in San Francisco, California, on various dates between October 16 and December 15, 1967. Briefs were filed by the parties on February 19, 1968, and reply briefs ten days later.

The Salient Issues

1. Although there is agreement among the parties as to the base period quarterly earnings for the year preceding August 1, 1959, and also for interim earnings, medical expenses and other deductible expenses, there is disagreement as to the wage formula that should be applied in computing the terminated employees' gross backpay during the backpay period which commences on September 14, 1962, and ends on January 18, 1965. The contract under which the parties operated prior to the time the employees were terminated had a wage formula which provided that wage scales shall be established at 12½ cents per hour less than the building trades millwrights' rate. The Employer, Fibreboard, takes the position that since this contract expired on July 31, 1959, when the employees were terminated, the validity of this formula expired with it. Therefore, its argument continues, one must look to or have recourse to other indicia in determining what the appropriate wage rate should be during the backpay period. This wage rate, contends Respondent, should be the hourly wage rates paid its ILWU millwrights who from 1946 to 1959 received the same rate and did comparable work as the terminated machinists.

The Union's position is that the contract did not terminate but continued in effect, automatically renewed each year for a 1-year term from August 1, 1959, until the parties negotiated a new contract in July 1965. Therefore, argues the Union, the above-described formula embodied in the contract is the most appropriate measure of the wage scale available and, accordingly, should be applied.

The General Counsel argues that whether or not the contract terminated is immaterial because the best objective formula to be applied in computing the employees' gross backpay is the formula in the contract which was used since 1951 to establish the employees' wage scale.

2. Also, in dispute is the number of jobs which were available during the backpay period when the terminated employees were replaced by an independent contractor.

3. Whether the Company is obligated to the dischargees for certain specified pension benefits for the period from August 1, 1959 (the date of the employees' termination), to September 14, 1962 (the date the Board's supplemental decision issued), for which period of time no backpay was ordered by the Board.

4. Whether severance payments made at the time the employees were terminated should be deducted from backpay due.

5. What the appropriate compulsory retirement dates are with respect to seven terminated employees.

6. Whether interest on backpay should accrue even though the Board's supplemental decision contained no order that interest be paid.

7. Whether three dischargees forfeited their rights to reinstatement and backpay because of alleged picket line violence.

COMPUTATION OF GROSS BACKPAY

The General Counsel and Union's Contentions

Counsel for the General Counsel and the Union contend gross backpay should be computed on the basis of the terminated employees' basic wage rate to the wage rate of the construction millwrights in the Bay Area of Northern California. This "objective" criterion, they state, was originally embodied in the Union and Respondent Company's collective-bargaining agreement effective August 1, 1951,[5] and had been incorporated in each succeeding agreement through July 31, 1959. Section I of these collective-bargaining agreements established the wage scale formula of the unit employees[6] "at one dollar per day less than the prevailing Building and Construction Crafts' scale" [construction millwrights] and further provided that the said wage scale "shall be applied automatically August 1 of each year."[7] The said agreements also established a workday of 8 hours. Accordingly, the $1 per day amounted to a differential of 12½ cents per hour.[8]

The constructio crafts' [millwrights] hourly scale for work of the type performed by the unit maintenance machinists employees, the dischargees herein, as set forth in applicable contracts during the backpay period of Septem-

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5. Union's Exhibit No. 4.

6. Classifications encompassed within the unit of maintenance employees were: maintenance machinists, firemen, engineers, helpers, and working foreman. See Appendix "A" of Union's Exhibit No. 4.

7. The terms "building trades millwrights, building and construction crafts," and "construction millwrights" are used interchangeably in the transcript and in this decision.

8. Also known as the "Pabco formula." See Section 1 of Union's Exhibit No. 4.

ber 14, 1962, to January 18, 1965, was as follows: June 16, 1962—$4.40; June 16, 1963—$4.63, and June 16, 1965—$4.925.[9] Accordingly, contends the General Counsel and the Union, the basic hourly wage rate of the terminated employees which should be applied in computing their gross backpay is 12½ cents per hour less than the construction crafts' scale or: August 1, 1962—$4.275; August 1, 1963—$4.505, and August 1, 1965—$4.80.

The General Counsel claims that the quarterly gross backpay for each terminated employee should be determined by multiplying each one's average quarterly earnings by a factor obtained by dividing the applicable backpay period wage rate by the basic wage rate of $3.525 of the parties' collective-bargaining agreement in effect at the time of the unfair labor practices. Thus, under the General Counsel's formula the factors applicable to various portions of the backpay period, reflecting changes in the wage scale, are as follows:

September 14, 1962, to July 31, 1963—$\frac{4.275}{3.525}$ or 1.212;[10] and for the period from August 1, 1963, to July 31, 1965—$\frac{4.505}{3.525}$ or 1.278; and from August 1, 1965, to July 31,

9. The wage rates of the construction crafts, also referred to as building trades millwrights, that were in effect from 1959 to the beginning of the backpay period were: June 16, 1959—$3.76 an hour; June 16, 1960—$3.94½, and June 16, 1961—$4.18.

10. The gross backpay for each employee for the fraction of a quarter from September 14 to September 30, 1962, was computed by the General Counsel by multiplying 0.19, representing the fraction of a quarter involved, by his average quarterly earnings and then multiplying the product thereof by the appropriate factor for that period, namely, 1.212.

$$1967 - \frac{4.80}{3.525} \text{ or } 1.361.^{11}$$

In refuting the Company's contention that the contract between the parties terminated on July 31, 1959, (page 2, *supra*), and with it, the validity of this above-described wage formula, the Union argues that the contract did not terminate but continued, automatically renewed each year until a new contract was negotiated in July 1965.

The contract which was in effect on July 31, 1959, the date when the employees were terminated, provides at page 1, a renewal clause which reads as follows:

> This Agreement shall continue in full force and effect to and including July 31, 1959, and shall be considered renewed from year to year thereafter between the respective parties unless either party hereto shall give written notice to the other of its desire to change, modify, or cancel the same at least sixty (60) days prior to expiration.
>
> Within fifteen (15) days after notice of reopening is given, the opening party shall submit a complete and full list of all proposed modifications. All other sections shall remain in full force and effect. Negotiations shall commence no later than forty-five (45) days prior to the anniversary date of the Agreement unless otherwise mutually changed.

On May 26, 1959, the Union sent Respondent Fibreboard a letter notifying it as follows:[12]

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11. The gross backpay of each terminated employee for the period January 1 to January 18, 1965 (end of backpay period), was computed by the General Counsel by multiplying 0.20, representing the fraction of the quarter involved, by his average quarterly earnings and then multiplying the product thereof by the appropriate factor for that period, namely, 1.278.

12. Respondent's Exhibit No. 2.

> Pursuant to the provisions of The Labor Management Relations Act, 1947, you are hereby notified that the Union desires to modify as of August 1, 1959, the collective-bargaining agreement contract dated July 31, 1958, now in effect between the Company and the Union.
>
> The Union offers to meet with the Company at such early time and suitable place as may be mutually convenient, for the purpose of negotiating a new contract.

On June 15, 1959, the Union sent a letter to the Company specifying various proposals which it desired to discuss.[13] These proposals included wage scales, seniority, hours of work and overtime, holidays, night differentials, vacations, welfare plan, adjustment of complaints and the payment of 5 cents per hour to provide for supplementary unemployment benefits for employees laid off in a reduction in force.

The Union contends that in interpreting the above notice vis-a-vis the renewal clause of the contract, *supra,* a distinction must be drawn between a notice to terminate and a notice to modify. This letter, argues Union's counsel, is a notice to modify not terminate and, therefore, no notice to terminate was sent by the Union within the meaning of said contract's above-quoted renewal provision. Accordingly, concludes the Union, the contract was renewed for another year, namely, to July 31, 1960, subject to negotiations on those sections of the contract opened for modification, thus establishing that the wage formula in the contract continued in effect from August 1, 1959, to January 18, 1965, the end of the backpay period or until a new contract was executed by the parties in July 1965.

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13. Respondent's Exhibits Nos. 3(a) and (b).

Respondent's Contentions

Respondent states that the General Counsel and the Union's computation of gross backpay on the basis of the wage formula in the contract which terminated on July 31, 1959, results in a wage scale throughout the backpay period higher than the $4 rate to which the parties agreed when they executed a collective-bargaining agreement in July 1965. The Respondent asks rhetorically if it is reasonable to credit these terminated employees throughout the backpay period with wage rates higher than what the reinstated employees ultimately received when they returned to work pursuant to the Supreme Court's decision. Moreover, argues Respondent, the record clearly shows that the work done by the ILWU millwrights and the terminated machinists was comparable in skill as evidenced by the historical identity of their hourly wage rates from 1946 to 1959, and the fact that they were both being paid the same wage rate when the machinists were terminated. Therefore, contends Respondent, the formula which should be applied in computing what the dischargees would have received during the backpay period is the hourly wage rate which was paid by Respondent to its ILWU millwrights from September 14, 1962, to January 18, 1965.

Conclusions

Contract Termination

In determining whether the collective-bargaining agreement executed on September 24, 1958, expired on July 31, 1959, as Respondent contends, or automatically renewed itself each year until a new contract was negotiated in July 1965, as the Union claims, it should be borne in mind that not only did the Board in its original Decision and Order

state that the contract "expired July 31, 1959,"[14] but also there is no reference to the matter of contract termination in the Board's Supplemental Decision and Order.[15] Moreover, the Board stated in its original decision that "automatic renewal of the existing contract with the Steelworkers had been forestalled by the Union's letter of May 26, requesting substantial modifications in the existing contract."[16] The Trial Examiner in his decision also stated "the contract terminated . . . on July 31, not only by its own terms but also by reason of the Steelworkers' May 26 notice."[17] Furthermore, when the Union's letter of May 26, 1959, notifying the Company of its "desire to modify" the contract is considered in the context of a specific provision in said contract that it "shall continue in full force and effect from year to year unless either party shall give written notice of its desire to change, modify, or cancel the same at least sixty days prior to expiration,"[18] it would appear the Union's contention that the contract was not terminated passes the outermost bounds of reason. It simply will not bear the construction which Union's counsel propounds. Furthermore, the Union's reason for claiming the contract did not expire is without merit because the language of the renewal clause is unambiguous and clear in its meaning. It plainly and explicitly states that if no agreement is reached upon the Union's proposed modifications before the contract expiration date, the collective-bargaining agreement will terminate. Accordingly, in evaluating the foregoing circumstances, it is found that the parties' collective-bargaining agreement terminated at midnight on July 31, 1959.

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14. 130 NLRB 1558 at 1559.
15. 138 NLRB 550.
16. See page 5, *supra*.
17. 130 NLRB at 1573.
18. Respondent's Exhibit No. 1 at page 1.

Backpay Wage Rate

There is agreement among the parties with respect to the average quarterly earnings of each terminated employee during the base period, August 4, 1958 through July 31, 1959, as well as their interim earnings, medical and other expenses incurred in connection with interim employment. It was stipulated that, beginning with 1946 and ending on July 31, 1959, wage rates of millwrights, members of the International Longshoremen's and Warehousemen's Union, hereinafter referred to as ILWU millwrights (who are not to be confused with the ILWU production workers), employed in Respondent's Emeryville plant, received the same wage rates as the terminated maintenance machinists whose backpay is in issue. Subsequent to the machinists' termination, the ILWU millwrights continued to work throughout the backpay period and some of them replaced the terminated machinists in the felt mill and paint shop. It is uncontroverted that the wage rate paid by Fibreboard to its ILWU millwrights during the backpay period was identical with the hourly rate paid maintenance machinists under the Union's contract with Foremost Food and Chemical Company and that this was the highest wage rate paid maintenance machinists in the Bay Area[19] under any contracts that the Union herein had with other companies which employed maintenance machinists doing work and requiring skills comparable to that of the maintenance machinists at Fibreboard. See Respondent's Exhibits Nos. 7 and 9. In July 1959, Respondent's ILWU millwrights received $3.52 ½ per hour, the same as the terminated maintenance machinists. In September 1962, the beginning of the backpay period, the

19. The "Bay Area" encompasses the following nine counties: San Francisco, San Mateo, Contra Costa, Alameda, Marin, Sonoma, Solano, Napa and Santa Clara. U.S. Census Bureau.

ILWU millwrights wage rate was $3.695 per hour; June 1, 1963—$3.795 per hour; June 1, 1964—$3.895 which hourly rate remained in effect until June 1, 1965, when it was increased to $3.985.

It also stipulated that when the terminated maintenance machinists were reinstated on March 22, 1965, they received $3.74 per hour upon their return to work as compared with the $3.895 which Respondent's ILWU millwrights were receiving at that time. Subsequently, on July 7, 1965, the Respondent and Union negotiated a contract in which they agreed upon a wage rate of $4 per hour for the reinstated maintenance machinists, effective July 15, retroactive to March 22, 1965. And on June 1, 1965, the Respondent's ILWU millwrights' hourly wage rate was increased to $3.985.

It will be recalled that the Union and General Counsel contend that the wage rates the terminated maintenance machinists should be credited with during the backpay period should be determined by the "Pabco wage formula" embodied in the contract which expired on July 31, 1959.[20] The Respondent Fibreboard claims, however, the best measure of what the reinstated employees would have received during the backpay period is the rate Respondent paid its ILWU millwrights who did work comparable in skills and whose wage rate for 13 years had been the same as the terminated maintenance machinists.

If the General Counsel and Union's formula were to be adopted, the dischargees would receive an hourly wage of $4.505 for the last 6 months of the backpay period as contrasted with both the $3.74 rate at which they returned to

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20. The Pabco wage formula provides a wage rate of 12½ cents an hour less than the construction millwrights' wage scale. See page 3, *supra*.

work in March 1965, and the $4 per hour agreed upon subsequently by the parties under their collective-bargaining agreement effective July 15, 1965. Moreover, the wage rates which would have been payable under the 1959 expired contract, had it remained in effect, would have been excessive as compared with the wage rates paid by other employers in the Northern California Bay Area who had contracts with the Charging Union involving their maintenance machinists. The highest wage rates paid maintenance machinists during the backpay period under any of said contracts were those paid by the Foremost Food and Chemical Company. See Respondent's Exhibit No. 9. It is uncontroverted that during the first portion of the backpay period, beginning in August 1962, Foremost's maintenance machinists were receiving $3.57 per hour as contrasted with $4.275 which would have been payable under the "Pabco" formula in the Fibreboard contract for the period August 1959 to August 1960. [21] This $3.57 Foremost figure for August 1962, as compared with the $4.27½ Pabco rate as of August 1959, reveals that the "Pabco" formula is both unreasonable and unrealistic. Corroborative of this predicate is the Board's finding in its decision that Fibreboard's concededly valid economic reason for subcontracting its maintenance work to an independent contractor in 1959 was due to its maintenance costs being too excessive.[22]

If the Union's theory were to be given credence that the contractual wage formula in the 1959 agreement remained operative thereafter, it would have resulted in an automatic wage increase to $3.53½ an hour for the unit employees beginning in August 1959, whereas more than 5 years later in January 1965, and in an economy of rising prices, the independent contractor's employees received $4, and the

21. See pages 3, 4 and footnote 9, page 4.

22. *Fibreboard Paper Products Corporation,* 130 NLRB 1558.

reinstated dischargees upon their reinstatement in March 1965, received $3.74 which was raised four months later to $4, and Respondent's ILWU millwrights received a wage rate of only $3.895. [23]

Moreover, if the General Counsel and Union's backpay formula were to be adopted, the employees would receive during the last quarter of 1962, a wage rate of $4.27½ as contracted with the $4 eventually agreed upon in July 1965. Continuing this comparison, the contractual or "Pabco" formula would have resulted in wage rates of $4.50½ per hour for the backpay period from August 1, 1963 to August 1, 1964, and $4.80 as of January 18, 1965, the end of the backpay period, or 50 cents and 80 cents per hour more than the $4 wage rate discharged employees subsequently received under the contract which was executed in July 1965 after their reinstatement.[24] It would not only be specious, but

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23. The record is not entirely clear as to the exact wage rate the independent contractor who took over the duties of the terminated unit employees was paid by Respondent in January 1965, but it appears to have been approximately $4 per hour. It should be noted in this regard that the independent contractor paid his employees time-and-a-half for overtime whereas Respondent had paid the terminated employees double time. When the parties executed a contract in July 1965, it provided double time for overtime. The $4 rate paid the independent contractor is equivalent to what the independent contractor was receiving as of January 1965, which figure, in addition to a basic hourly rate, includes also overtime rates and fringe benefits. It was also stipulated that the employees of the independent contractor for the period from 1959 to 1965 that were doing millwrights' work were paid the rates of millwrights under the contract between the building trades union and the Associated General Contractors in the Bay Area. See pages 843 and 935 of the record.

24. Union's Exhibit No. 23 shows the relationship between the wage rates in the Fibreboard contract, Foremost contract and BLS Occupational Wage Survey for the San Francisco-Oakland area for January 1958 and 1959. In January 1958, the Foremost rate was $2.93 and Fiberboard's $3.375; January 1959, Foremost $3.04 and Fibreboard $3.525. See page 7, *supra*, with respect to the wage rates received by Respondent's ILWU millwrights during the backpay period. See also Respondent's Exhibit No. 8(c).

indeed strange, to adopt the Union and General Counsel's formula under which the terminated employees would receive during the 1962-1965 backpay period a wage rate higher than the $4 hourly rate established in the contract executed by their Union with the Respondent in July 1965.[25]

Furthermore, to adopt the Pabco formula would be contrary to precedent, as the Board has repeatedly held that the fairest measure of computing backpay, in situations such as this, is to adopt a wage scale paid other employees in the same plant who do similar work requiring comparable skills. Loss of earnings of backpay claimants should be measured by the earnings of their replacements or comparable employees.[26] Probative of the fact that the work of the terminated machinists and ILWU millwrights was similar and required comparable skills is their identical wage scale prior to July 31, 1959, and the testimony of Maffey, Project Engineer at Fibreboard's Emeryville plant, that the dischargees who worked in the paint shop and felt mill were replaced by Respondent's ILWU millwrights.

Finally, it should be borne in mind that when it was agreed by the Respondent and Union in July 1965, that the reinstated employees should receive a wage rate of $4, the ILWU millwrights employed by Respondent were receiving approximately the same wage rate, namely $3.98½ an hour. Also corroborative of the soundness of this $4 rate is the cogent fact that it was higher than the cost of living increases which had accrued during the backpay period.

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25. Under the "Pabco formula," the wage rate would have been $5.40 as of August 1, 1967.

26. *Alaska Chapter of the Associated General Contractors,* 119 NLRB 663, 667; *East Texas Steel Castings Company, Inc.,* 116 NLRB 1336, 1337-1339, 1353; *Pugh and Barr, Inc.,* 102 NLRB 562, 564-565.

Accordingly, it is found that the formula to be applied in computing the terminated maintenance machinists' gross backpay is the wage rate paid by Respondents to its ILWU millwrights from September 14, 1962 to January 18, 1965.

The record is clear that the ILWU millwrights employed by Respondent not only performed work involving skills comparable to those of the terminated maintenance machinists, but also they were paid the same wage rates as the machinists from 1946 to July 31, 1959. Thus, on July 31, 1959, they, like the maintenance machinists, were receiving a wage rate of $3.525 per hour. Subsequent to the machinists termination, the ILWU millwrights not only continued to work throughout the backpay period but in a few instances replaced the terminated maintenance machinists in the felt mill and paint shop. From the fact that the ILWU millwrights received no wage increases in 1959 or 1960, it is not too unreasonable to assume that the ILWU recognized the soundness of Fibreboard's claim that the terminated machinists' wage rates under the "Pabco formula," which also determined the ILWU millwrights' wage rates, were "too high."[27] This is evidenced by the Company's action in terminating the machinists and subcontracting the maintenance work to an independent contractor at a wage rate less than the machinists had been receiving. Thereafter, beginning in 1962, the ILWU millwrights received the same wage *increases* as the ILWU production employees.[28] The ILWU millwrights were paid during the backpay period the following wage rates: July 1, 1962—$3.695 per hour; June 1, 1963

27. It strains one's credulity to believe the testimony of William Burke, Business Agent for the ILWU, that the reason the ILWU millwights in Respondent's plant received no wage increase in both 1959 and 1960 was because he forgot all about them.

28. However, at no time was the ILWU millwrights hourly wage rate the same as the ILWU production workers.

—$3.795 per hour; June 1, 1964 to June 1, 1965—$3.895 per hour.[29] For these and other reasons delineated below and based on Board precedent, it is found, that the wage rate during the backpay period paid to the ILWU millwrights in the performance of work comparable in skills to that which had been performed by the terminated machinists and whose wage rates for 13 years had been the same as the machinists is a reliable and logical yardstick and the best measure of what the maintenance machinists would have received during the backpay period.[30]

Indicative of the lack of realism in the position of the General Counsel and the Union that the dischargees should receive under the "Pabco formula" $4.505 per hour in January 1965, is the cogent fact that in July 1965, Local 1304 entered into collective-bargaining agreements with Fibreboard, Foremost Food and Chemicals Company and Encinal Terminals which provided a $4 per hour wage rate for the maintenance machinists employed by all these three companies. Also corroborative of the soundness of this $4 rate is the fact that it was higher than the cost of living increases which accrued during the backpay period and more than the highest wage rate received by maintenance machinists during the backpay period who were working for other employers under contract with Local 1304. On the other hand, the terminated employees would receive under the Union's

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29. These wage rates were highest payable to maintenance machinists under any contract which Local 1304 had with other Bay Area employers. See Respondent's Exhibits Nos. 7 and 9.

30. Maffey, a company official's testimony to this effect, stands uncontradicted which is confirmed by the ILWU millwrights' wage history after the machinists were terminated and also by Ferber, a union official, who on cross-examination testified that the bargaining unit employees did work "very similar" to Local 1304 maintenance machinists who were employed at other Bay Area plants with which the Union had contracts.

formula upon their reinstatement a wage rate higher than that in their contract executed in July 1965 with Respondent.

On the basis of the facts detailed above, and applicable precedent, it is found that in computing what the dischargees would have received during the backpay period beginning on September 14, 1962 and ending January 18, 1965, is the wage rates paid the Respondent's ILWU millwrights.[31] The Board has repeatedly held that the loss of earnings of backpay claimants should be measured by the earnings of their replacements or other comparable employees of the Respondent during the period involved.[32]

* * * * * * *

Interest on Backpay

There is disagreement among the parties as to whether these terminated employees who are entitled to backpay should also receive interest in view of the fact that the Board's supplemental decision contained no order that interest be paid.

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31. In September 1962, the ILWU millwrights were receiving $3.695; June 1963—$3.795; June 1964—$3.895; June 1965—$3.98½; June 1966—$4.075, and June 1967—$4.275. It should also be noted that from July 31, 1959, until June 1961, there was no increase in the ILWU millwrights' wage rates which would appear to indicate that the ILWU tacitly recognized that Local 1304's maintenance machinists' wage rate as of July 31, 1959, was excessive. This is further evidenced by the Company subcontracting the maintenance work to an independent contractor in August 1959 at a wage rate less than what the terminated machinists would have received under the Pabco formula. See page 935 of the transcript and Union's Exhibit No. 19.

32. *International Association of Heat and Frost Insulators, et al.*, 261 F.2d 347, 350 (C.A. 1).

Conclusions

Originally, the Board did not order payment of interest on the net backpay award where it was not required by the Board's original order.[63] Later the Board allowed interest on earnings lost as a result of "discrimination," even when the original order was silent thereon.[64] Thereafter, the Board on December 21, 1965, did not disturb a Trial Examiner's holding that interest should accrue on a quarterly basis from the end of each quarter for which backpay is owed with interest at 6 percent per annum.[65] It is, therefore, recommended that interest be paid on the net backpay from September 14, 1962, as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

• • • • • • •

[The portion of the Trial Examiner's Decision relating to the picket-line misconduct has not been printed inasmuch as in his decision on this subject the Examiner found that, by reason of their violent conduct, two individuals were not entitled to reinstatement or backpay, but did not discuss the question whether Petitioner's defense under Section 10(c) of the National Labor Relations Act should be disallowed as untimely.]

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63. *Mooney Aircraft, Inc.*, 148 NLRB 1057 at 1059.

64. *Local 138, International Union of Operating Engineers*, 151 NLRB 972, 974; *Lozano Enterprises*, 152 NLRB 258, 260, footnote 8. Both these cases involved flagrant examples of discrimination as distinguished from the present case where there was no orthodox discrimination practiced, namely, a discharge for union activities or membership.

65. *American Compress Warehouse*, 156 NLRB 267, 276, footnote 35, enfd. 374 F.2d 573 (C.A. 5).

RECOMMENDED ORDER

On the basis of the foregoing, it is recommended that Fibreboard Paper Products Corporation, its officers, agents, and successors and assigns pay to each of the twenty-one individuals listed below, in order of their seniority, the sum of money listed opposite his name, plus interest, less deduction required by State and Federal laws:

Machinists

*L. J. Nash	See Appendix A, page i
W. Jackson	$ 3,912.23
D. Wittorff	4,230.45
M. Crispino	4,691.74
R. Hamidy	2,227.65
J. Cruze	5,783.16
E. Schlotterbeck	5,382.46
*F. Bennett	See Appendix A, page ii
M. Schoenfeld	1,867.06
G. Goranson	767.95
R. Jensen	12,982.30
J. Longnecker	4,142.79
H. Bradford	3,733.05
A. Fusare	4,916.71
J. Price	17,466.44
H. Cunningham	7,869.55
L. Raineri	14,974.66
W. Reihl	764.20
V. O'Leary	3,555.73
C. Fontes	None (See Appendix A, page iv)
D. Lippert	1,379.68

Power House Engineers

*F. Lowell	See Appendix A, page iv
R. Hughes	$ 13,363.09
H. F. Haueter	6,373.30
E. Johnson	13,214.92
G. Novacek	3,492.07
J. Griffin	1,837.79

	Power House Firemen
C. W. Olson	$ 10,042.61
E. Mann	5,117.06
J. Van Zoen	1,586.98
J. Wall	3,034.38
	$158,710.01

*These dischargees who elected to take early retirement received pension benefits in excess of the backpay owing them. See Appendix A.

Dated: May 23, 1968

Henry S. Sahm
Trial Examiner

[Appendix A to the Trial Examiner's Decision, consisting of six pages, has not been printed in this Appendix.]

Filed January 11, 1971

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,772

United Steelworkers of America, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,
Respondent.

No. 23,853

Fibreboard Corporation,

Petitioner,

v.

National Labor Relations Board,

Respondent.

JUDGMENT

Before: Wright and Tamm, Circuit Judges, and Matthews,* Senior District Judge.

THIS CAUSE came on to be heard upon petitions to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board, dated December 15, 1969, against Fibreboard Corporation, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on October 27, 1970, and has considered the briefs and transcript of record filed in this case. On Novem-

*Sitting by designation pursuant to 28 U.S.C. § 294(c), (1964).

ber 18, 1970, the Court, being fully advised in the premises, handed down its opinion denying the petitions for review, and granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the said order of the National Labor Relations Board against Fibreboard Corporation be enforced; and that Fibreboard Corporation, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

JOHN WRIGHT
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

EDWARD ALLEN TAMM
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Senior District Judge Matthews dissents from the foregoing judgment.

Filed January 18, 1971

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,772

United Steelworkers of America, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,

Respondent.

No. 23,853

Fibreboard Corporation,
Petitioner,

v.

National Labor Relations Board,

Respondent.

Before: Wright and Tamm, Circuit Judges; Matthews*, Senior District Judge; in Chambers.

ORDER

On consideration of the Fibreboard Corporation's petition for rehearing, it is

ORDERED by the Court that the petition of Fibreboard Corporation is denied.

Per Curiam
For the Court:
NATHAN J. PAULSON
Clerk

*Sitting by designation, pursuant to 28 U.S.C. § 294(c).

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1569

FIBREBOARD CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

FIBREBOARD CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Fibreboard Corporation prays by this petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered January 11, 1971.

OPINIONS BELOW

The divided, *per curiam* opinion of the Court of Appeals is not yet reported except at 75 LRRM 2609 and 64 LC ¶ 11,280; this opinion is reproduced in Appendix A to this petition. The Supplemental Decision and Order of the National Labor Relations Board, issued December 15, 1969, and the Trial Examiner's Decision, which was issued May 23, 1968, are reported at 180 NLRB No. 33, and reported in

part at 72 LRRM 1617 and 1969 CCH NLRB ¶ 21,454. Both the decision of the Board and that of the Trial Examiner are reproduced in the Appendix ("A.") printed for the use of the Court below and filed herein by the Clerk of the Court of Appeals.

The proceedings below were concerned with the enforcement of the Board's Supplemental Decision and Order of September 13, 1962, reported at 138 NLRB 550. This Order was enforced by the Court of Appeals for the District of Columbia Circuit on July 3, 1963, in an opinion reported at 116 U.S. App. D.C. 198, 322 F.2d 411. The Court of Appeal's decree of enforcement was affirmed by this Court on December 14, 1964, in an opinion reported at 379 U.S. 203.

JURISDICTIONAL STATEMENT

The opinion of the Court below was handed down on November 18, 1970, and the Court's judgment entered January 11, 1971. A petition for rehearing was timely filed, which was denied by the Court on January 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). The jurisdiction of the Court below and of the National Labor Relations Board rested on 29 U.S.C. Secs. 160(a), (b), (c), and (f).

QUESTIONS PRESENTED FOR REVIEW

1. The National Labor Relations Board imposed upon Petitioner retroactively wage rates to which it had never agreed and to which it had refused to agree. In so doing, did the Board act counter to the prior decision of this Court holding that Petitioner was under no duty to so agree, and did it act in excess of its jurisdiction and power by compelling Petitioner to agree to conditions of employment more burdensome than any which ever prevailed in the industry, including those set forth in the collective bar-

gaining agreement which Petitioner and the Union executed after bargaining pursuant to the Board's original order in this case?

2. The National Labor Relations Board ordered back pay and reinstatement for individuals discharged for cause, without evidence, hearing or findings. In so doing, did the Board exceed its statutory power and violate the plain provisions of Section 10(c) of the Act that no Board order shall require reinstatement or back pay for individuals so discharged?

3. In the enforcement proceedings below the National Labor Relations Board ordered that Petitioner was liable for interest accruing throughout the back pay period on the amounts found to be owing, although the Board's original remedial order herein did not require the payment of such interest. In modifying its original order in such manner, did the Board act in excess of its authority and contrary to the holding of this Court that the Board cannot change the content of a remedial back pay order after the order has received enforcement from a Court?

4. Did the decision of the Court below summarily affirming the order of the Board deny Petitioner its right to be heard respecting the rights reserved to it by the Act, by the Board's original order and by the decision of this Court affirming the Board's original order?

STATUTES

Statutes significantly involved in this case are Sections 8(d) and 10(c), of the National Labor Relations Act (29 U.S. Code Secs. 158(d), 160(c)). The text of these statutes is set forth in Appendix B, with the portions pertinent to this case printed in italics.

STATEMENT OF THE CASE

Effective as of midnight July 31, 1959, Petitioner Fibreboard Corporation (then Fibreboard Paper Products Corporation) terminated the maintenance employees at its plant in Emeryville, California, and turned the maintenance work over to an independent contractor ("Fluor") for the latter to perform pursuant to a contract with the company. A large portion of Petitioner's maintenance personnel were machinists represented by Local 1304 of the United Steelworkers of America (herein "Union"). Pursuant to a timely notice given by the Union, the collective bargaining agreement between Petitioner and the Union terminated at midnight, July 31, 1959 (A. 58).

The Prior Related Proceedings.

The terminations were followed by picketing at the Emeryville plant by Local 1304 and the filing of unfair labor practice charges by that Union. These charges were, in the first instance, dismissed by the Board on the grounds that Petitioner's decision to sublet the work was predicated upon its legitimate concern over the excessive costs of its maintenance operation, not upon any anti-union motive, and therefore there was no requirement that it negotiate with the Union before putting its decision to subcontract into effect. *Fibreboard Paper Products Corporation,* 130 NLRB 1558 (1961).

A year and one-half after the Board's original decision the Board issued a Supplemental Decision and Order wherein it reversed itself and held that Petitioner had violated Section 8(a)(5) of the Act by failing to bargain with the Union prior to subcontracting the work. *Fibreboard Paper Products Corporation,* 138 NLRB 550 (1962). The Board's remedial order required Petitioner to reinstate its

maintenance operation and the employees represented by the Union, with backpay from the date of the Board's Supplemental Decision (September 13, 1962) to the date of the offers of reinstatement, and to bargain collectively with the Union concerning the decision to sublet the maintenance work (*id.* at 555-557).

Subsequently, on petitions for review and the Board's cross-petition for enforcement, the Court of Appeals for the District of Columbia Circuit affirmed and granted enforcement to the Board's order. *East Bay Union of Machinists, Local 1304 v. NLRB,* 116 U.S. App. D.C. 198, 322 F.2d 411 (D.C. Cir. 1963).

Thereafter, on a writ of certiorari granted upon the Petitioner's petition, this Court affirmed the decision of the Court of Appeals enforcing the Board's order. *Fibreboard Corporation v. NLRB,* 379 U.S. 203 (1964). The Court held that a statutory duty to bargain existed and agreed with the Court of Appeals that the Union should "be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly", but held that Petitioner was not bound to accept specific proposals or to make specific concessions. The Court also upheld the Board's authority to restore the *status quo ante* so as to insure meaningful bargaining by ordering a resumption of Petitioner's maintenance operation and reinstatement with back pay.

The Present Proceedings and Their Background.

On January 18, 1965, following this Court's decision, Petitioner made offers of reinstatement to all of the former employees save three who had been convicted of contempt of court for their misconduct during the picketing which had followed Petitioner's letting of the maintenance work.

Petitioner also bargained with the Union and, in July 1965, executed a bargaining contract with the Union pursuant to which the Union's maintenance personnel were retained in Petitioner's employ (A. 647, 660).

On August 17, 1967, the Regional Director issued a back pay specification and thereafter the matter was heard before a Trial Examiner on numerous dates between October 16 and December 15, 1967. This enforcement proceeding was concerned with implementing the Board's remedial order that Petitioner make the terminated employees "whole for any loss of earnings suffered as a result of [Petitioner's] unlawful action in bypassing their bargaining agent . . ." (138 NLRB at 555). On May 23, 1968, the Trial Examiner issued his decision (A.3). On December 15, 1969, the Board handed down its decision in which, in almost every respect, it rejected the Trial Examiner's findings and recommendations (A. 57).

Petitions for review of the Board's Supplemental Decision and Order were filed with the Court below pursuant to 29 U.S.C. Section 160(f) by both Petitioner and the Union and a cross petition for enforcement was filed by the Board. On November 18, 1970, the Court below, with one Judge dissenting, handed down a *per curiam* opinion in which it denied the petitions and granted enforcement to the Board's order.

The Wage Rates Ordered by the Board.

The wage rates the Trial Examiner applied to the back pay claimants for the years encompassed by the back pay period, which were based upon the rates received by employees in Petitioner's employ during this period who did comparable work (ILWU millwrights), were higher than the highest rates paid during these years to machinists.

under any contract the Union had with any other employer in the area (A. 9-14, 646). The rate recommended by the Trial Examiner, which was $3.985 per hour beginning in June 1965 (A. 59, n. 5; A. 559), and the $4.00 rate fixed in July 1965 in the bargaining between Petitioner and the Union (A. 659, 661), also were the equivalent of the highest machinist rate paid in that year by any other employer having a collective bargaining agreement with the Union (A. 646).

The Board rejected the rates determined upon by its Trial Examiner and instead fixed the back pay rates on the basis of the contract between the parties which had expired July 31, 1959 (A. 58-66). The rates which the Board ordered were not those which had been payable under this expired contract, but were predicated upon a series of annual renewals of the contract with substantial wage increases from 1959 to the end of the back pay period in 1965.[1] These were rates which Petitioner refused to pay the ILWU millwrights after July 31, 1959 (A. 541-544) and which it declined to pay to the Union's machinists when bargaining with the Union in 1965 (A. 544-547, 474-479, 481-483). The rates imposed by the Board over the years of the back pay period exceeded by $.58 to $.78 an hour both the rates paid the ILWU millwrights for comparable work and the highest rates received by the Union's machinists in the employ of others, and were $.80 an hour in excess of the rate the parties in fact agreed to when they bar-

1. The wage rates payable under the expired contract and the successive annual or biannual increases the Board ordered for the back pay claimants were based on a formula (called the Pabco formula) which set the machinist's rate at 12½¢ per hour, or one dollar per day less than the prevailing rate paid to millwrights in the construction industry (A. 58-59, 634). The progression of rates paid the construction industry millwrights is stipulated to in the record at A. 580.

gained pursuant to the Board's order in mid-1965 (A. 59, n.5, 580, 646).

The Board did not find that Petitioner would have agreed to the rates which it imposed, but only that there was no *certainty* that Petitioner would not have so agreed. The Board simply decreed that Petitioner, having failed to bargain in 1959, was to be treated as having agreed to the Union's wage demands in that year and in every subsequent year until the end of the back pay period.

The Board's Refusal to Consider Petitioner's Statutory Defense to the Reinstatement Order.

Petitioner did not offer reinstatement to three former employees who had engaged in acts of violence during the picketing which followed the discontinuance of Petitioner's maintenance operation and who, on December 2, 1959, had been adjudged in contempt of court for their activities (A. 661, 668). In the enforcement proceedings below Petitioner contended that, under Section 10(c) of the National Labor Relations Act (29 U.S.C. § 160(c)), these three employees were subject to discharge for cause and hence not entitled to reinstatement or backpay. The Trial Examiner found that the misconduct of two of these employees was sufficiently serious to warrant denying them reinstatement and back pay, and excluded them from his recommended award (A. 39-40).

The Board, reversing the Trial Examiner, declined to consider the Section 10(c) right of the company to refuse reinstatement for cause or to consider the limitation contained in that statute on the Board's power to award reinstatement and back pay to employees discharged for cause. It held that by failing to raise this issue in the original proceedings on the charge that it had unlawfully failed to bargain with the Union, Petitioner had forfeited its right to challenge the Board's power to order reinstatement

in the back pay proceedings (A. 78-84). There was no charge in the original proceedings that Petitioner had violated the Act by not reinstating the employees; those proceedings were limited to a charge that Petitioner had acted in violation of 8(a)(1), (3) and (5) in failing to bargain concerning subcontracting the maintenance work and terminating the employment of its maintenance employees.

Petitioner's reinstatement and back pay liability was created solely by the remedial order fashioned by the Board in 1962, and the definition of Petitioner's obligations under that order came before the Board for the first time in the back pay hearing. The Board nevertheless held that Petitioner was required at the unfair labor practice hearing to anticipate the remedy ultimately ordered by asserting its defense to any future reinstatement or back pay for employees discharged for cause and, for failure to do so, its rights and the limitations on the Board's power under Section 10(c) of the Act were deemed nullified.

The Board's Modification of Its Original Order.

Under the terms of the Board's original unfair labor practice order herein, the back pay liability was to be computed on the basis of net earnings lost for each quarter of the back pay period *Fibreboard Paper Products Corp., supra,* 138 NLRB at 555. As had been its practice for some twenty-seven years, the Board did not include in the order any liability for interest during the back pay period *(ibid.)*. In a decision rendered shortly after its original decision in the instant case, the Board re-examined its prior policy and determined that thenceforth its back pay orders would expressly include a liability for interest accruing on each of the quarterly amounts found owing, commencing with the end of each quarter. *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

In all cases subsequent to its decision in *Isis Plumbing* the Board expressly specified that its back pay orders included interest on the quarterly amounts of back pay found to be owing. However, with regard to remedial orders entered prior to that case, the Board declined to require such interest when determining the back pay liability in supplemental enforcement proceedings for the reason that a liability for this interest had not been imposed by its original order. In the enforcement proceedings below the Board expanded the terms of its original order by imposing a liability for interest throughout the back pay period, without any consideration of its authority to change its order in this manner, and without any explanation as to why it had chosen to impose such a liability in this case when it had never previously done so in numerous identical cases.

THE REASONS FOR GRANTING THE WRIT

I. By Affirming the Board's Order Imposing on Petitioner Wage Rates to Which It Had Refused to Agree Voluntarily, the Court Below Rendered a Decision in Conflict with This Court's Prior Decision Herein, in Conflict with Other Decisions of This Court and in Conflict with the Decisions of Other Circuits; In So Doing the Court Summarily Approved an Order of the Board Which Was Penal in Effect and in Excess of the Board's Powers.

THE CONFLICT WITH THIS COURT'S PRIOR DECISION HEREIN.

The Board's order below, which retroactively imposed upon Petitioner costly wage rates without consideration of whether these rates were likely to have been agreed to had the parties bargained and despite the fact that these same rates were rejected when the parties did bargain, cannot be reconciled with the Board's original order or with the decision of this Court affirming that order. In its prior

decision this Court held that Petitioner was under no obligation to surrender its legitimate economic interests to the Union's demands and that the bargaining duty resting upon it was not a duty to agree to proposals or a duty to make concessions, but, on the contrary, in the language of the Court of Appeals, Petitioner's obligation was to afford the Union "an opportunity to meet management's complaints that its maintenance operation was unduly costly" (379 U.S. at 214). The Board's back pay award and the decision of the Court below enforcing it departed from the original remedial order, as upheld by this Court, for they deprived Petitioner of its lawful right to call a halt to its unrealistic maintenance costs by imposing upon Petitioner, without regard to its unwillingness to agree thereto, that which was the root cause of the excessive costs—exorbitantly high wage rates which were far in excess of those prevailing in other plants in the area (see, A. 543, 555-556).

The effect of the holdings below was to change a remedial order limited to restoring the situation to what it would have been had the bargaining failure not occurred, to one which imposed contractual penalties on Petitioner. The remedy thus imposed was contrary to the conditions prescribed by this Court in approving the Board's order and it is urged that the Court grant certiorari and exercise its supervisory power to the end that the remedy imposed on Petitioner be brought into conformity with this Court's decision.

THE CONFLICT WITH OTHER DECISIONS OF THIS COURT.

The decision of the Court below conflicts with this Court's recent decision in *H. K. Porter Company, Inc. v. NLRB*, 397 U.S. 99 (1970), in which the Court held that it is not within the Board's remedial power to impose contractual

obligations upon a nonconsenting employer, even in that case wherein the employer's refusal was motivated solely by an intent to frustrate agreement. See also, *Tex Tan Welhausen Co. v. NLRB,* 397 U.S. 819 (1970). Although the decision below upholds the Board's authority to create contractual obligations retroactively rather than prospectively, the Court of Appeals offered no explanation for its implicit distinction.

The National Labor Relations Board itself has recently determined that there is no rational basis for distinguishing between the Board's remedial authority to order contractual terms *in futuro* in the absence of agreement, and its authority to impose terms retroactively. *Ex-Cell-O Corp.,* 185 NLRB No. 20, 74 LRRM 1740, 1743 (1970). In so doing, the Board declined to adopt a view expressed by the Court below in prior decisions that a flagrant disregard by an employer of its bargaining obligations may empower the Board to enter a remedial order imposing liabilities predicated upon a determination by the Board as to what the parties *would* have agreed. *Steelworkers v. NLRB,* 430 F.2d 519 (D.C. Cir. 1970); *IUE v. NLRB,* 426 F.2d 1243 (D.C. Cir. 1970). However, not until its instant decision has even the Court below, which traditionally has taken a liberal view towards the Board's remedial powers, held that the Board has the authority to impose contractual terms where the employer has refused to agree to the very terms the Board would impose. In upholding such a power in the Board, the Court sanctioned an order which is contrary to the limits on the Board's authority expressed in the *Porter* case.

It is respectfully urged that a writ issue herein to bring the decision of the Court below into conformity with the decision of this Court in the *Porter* case and to affirm the

rule of law that the Board is without power under the Act to compel an unwilling employer to accept proposals or agree to concessions as a basis for either past liability or future performance.

THE CONFLICT WITH OTHER CIRCUITS.

The decision of the Court below is, further, in direct conflict with the holding of the Second Circuit in *Cooper Thermometer Co. v. NLRB,* 376 F.2d 684 (1967). That Court, in a case involving a change in manufacturing locations, upheld the Board's order to bargain and its order for reinstatement and backpay, relying in part on this Court's prior decision in the instant case. In so doing, however, the Court declined to enforce the Board's order insofar as it required the employer to adhere to the terms of the expired contract pertaining to the old plant. Anticipating the rationale adopted by this Court in its *Porter* decision, the Second Circuit expressed its holding in the following language:

> "Since Cooper violated § 8(a)(5) by refusing to discuss the terms of transfer with the Union, requiring an offer of preferential reinstatement was proper . . . But reinstatement on what basis? . . . We think the reinstatement offer should be on whatever basis emerges from good faith bargaining between Cooper and the Union; recognizing the likelihood that such bargaining will produce little change from the current practices at [the new plant], we believe this would still be a much closer approximation to what bargaining would have yielded at the proper time. A sanction for refusal to bargain that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of the sort would give insufficient respect to Congress' di-

rection in § 8(d) that the obligation to bargain 'does not compel either party to agree to a proposal or require the making of a concession.'

"Award of back pay to workers who would have transferred to a new plant had there been proper bargaining is also something of a new departure . . . We think the Board is justified in requiring back pay in such cases for workers who would have transferred if proper bargaining had occurred. See Fibreboard Paper Prods. Corp. v. NLRB, supra, 379 U.S. at 215-217, 85 S.Ct. 398, 13 L.Ed. 2d 233. But the question again is back pay at what rate? The Examiner's solution—back pay at the rate provided in the old contract—would make the workers not merely whole but very much more; carrying over the old pay scales is something that Cooper was demonstrably unwilling to do and the Union rather obviously lacked economic power to compel. Yet the function of the Board's remedy is to restore 'the situation, as nearly as possible, to that which would have obtained but for' the illegal action, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 61 S.Ct. 845, 85 L.Ed. 1271 (1941) . . . Recognizing there can be no ideal solution, we think that in this case back pay also should be based on the results of the bargaining now ordered or, if this has none, on the [new plant] scale." (376 F.2d at 690-691)

The facts in *Cooper Thermometer* and the facts in the instant case are in all material respects the same and present precisely the same question of law, but that question was decided by the Second Circuit in a manner directly opposite to the decision by the Court below. It is respectfully submitted that the intervention of this Court is required to bring uniformity to the decisions of these Circuits.

THE CONFUSION ENGENDERED BY THE DECISION BELOW.

The Board has recently determined that it is precluded by this Court's decision in the *Porter* case from imposing upon even an employer egregiously defying the law a remedy which "operates retroactively to impose financial liability upon an employer flowing from a *presumed* contractual agreement." *Ex-Cell-O Corp., supra,* 74 LRRM at 1743. The Board, in so deciding, declared itself unwilling to follow the inconsistent view expressed in recent decisions of the Court of Appeals for the District of Columbia Circuit. *Steelworkers v. NLRB, supra; IUE v. NLRB, supra.* Thus, it appears that the conflict between Circuits and that between the rule of the *Porter* case and the decision of the Court of Appeals in this case creates confusion in the administration of the Act which requires the intervention of this Court for resolution. The question should be decided whether the Board can exercise its remedial authority retroactively, through either an original order or the imposition of back pay liabilities, in a manner which this Court has held it cannot do prospectively.

II. By Affirming the Board's Action in Refusing to Petitioner the Defense Reserved It Under Section 10(c) of the Act, the Court below Approved an Interpretation of the Board's Remedial Order Which Conflicts with the Limits on the Board's Authority Expressed in the Act, and in So Doing the Court Acted in Conflict with Other Circuits and Sanctioned Such a Departure from the Accepted and Usual Course of Administrative Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Section 10(c) of the National Labor Relations Act contains the following provision:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of

any back pay, if such individual was suspended or discharged for cause." (29 U.S.C. § 160(c); see Appendix B to this Petition).

The foregoing provision in the Act is an express and clearly stated limitation on the power of the Board with respect to the issuance or enforcement of any remedial order. It is as clearly a limitation on the authority of the Board as that expressed in Section 8(d) (29 U.S.C. § 158 (d); Appendix B) that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession," and the latter provision was held in the *Porter* case to be an absolute restriction on the Board's remedial powers.

In its decision herein the Board compelled reinstatement of, and awarded back pay to, employees whom Petitioner had declined to re-employ upon grounds which the Trial Examiner found constituted good cause. The Board set the Examiner's findings aside and held that Petitioner could not assert the restrictions of Section 10(c) by way of defense because Petitioner had not, prior to the fashioning and entry of the Board's remedial order, anticipated its terms and justified in advance its failure to reinstate those whom it had good cause not to reinstate (A. 78-84). The Board thus held itself relieved of the limitation in Section 10(c) because Petitioner had not raised this limitation in the original proceedings which involved no charge that Petitioner had violated the Act by not reinstating the employees and which gave no notice that if reinstatement were found to be an appropriate remedy and ordered by the Board, the order

would not be subject to the statutory restrictions on the Boards remedial authority.[2]

The end result of the Board's laborious reasoning on this point was that it construed its original remedial order to be absolute in terms; it held, with the approval of the Court below, that it had not by that order merely required reinstatement to the extent consistent with its authority to do so under the Act, but had ordered reinstatement even of individuals the Act expressly declares the Board cannot order reinstated. In so doing, the Board nullified the right reserved Petitioner under Section 10(c) to decline reinstatement to those who had engaged in violent misconduct.

The capriciousness of the Board's holding on this issue is reflected in the fact that the Board itself had previously held just the contrary. Thus, in *St. Clair Lime Company*, 136 NLRB 262 (1962), the Board said the following with regard to its reinstatement order:

> "Our Order in this case is not to be construed as requiring reinstatement of those not entitled to it. The Respondent is required to reinstate only such strikers as are lawfully entitled to reinstatement *if and when*

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2. This ruling of the Board was not compelled by the principles of res judicata because the original charges presented no question whether the terminations were based upon or justified by the misconduct, nor did they include any charge that Petitioner had unlawfully failed or refused to reinstate the terminated employees which would bring into issue any misconduct which would obviate the duty to reinstate. See, e.g., *Phillips Mfg. Co.*, 148 NLRB 1420 (1964); *Tidelines Marine Service, Inc.*, 140 NLRB 288 (1962); *NLRB v. Lambert*, 211 F.2d 91 (5th Cir. 1954). The case quoted by the Board as supporting its ruling on this issue, *NLRB v. Mastro Plastics Corp.*, 261 F.2d 147 (2d Cir. 1958), was a case of the latter type, for the original charges included a charge that the employer had unlawfully refused to reinstate the striking employees and the misconduct the employer later sought to assert in defense to the Board's order was known to the employer at the time the original charges were litigated. See, *Mastro Plastics Corp.*, 103 NLRB 511 (1953), enf'd 214 F.2d 462 (2d Cir. 1954).

> they apply for reinstatement. In view of the facts in this case we deem it advisable to defer to the compliance stage of the proceeding herein the opportunity, which the Respondent is entitled to, for the substantiation of its claims regarding the picket line misconduct of strikers who may apply for reinstatement." (136 NLRB 262; emphasis in the original).[3]

The practice of the Board was in accord with this holding, for the Board consistently permitted misconduct to be asserted in enforcement proceedings as a defense to its orders of reinstatement even where that misconduct occurred before the hearing on the unfair labor practice charges, but was not material to the issues framed by the charges. E.g., *J. H. Rutter-Rex Manufacturing Co., Inc.,* 158 NLRB 1414 (1966); *Trinity Valley Iron and Steel Company,* 158 NLRB 890, 923 (1966); *Cone Brothers Contracting Company,* 158 NLRB 186 (1966); *Elmira Machine and Specialty Works, Inc.,* 148 NLRB 1695 (1964); and see, *Tasty Box Lunch Company, Inc.,* 175 NLRB No. 7, 70 LRRM 1516 (1969); *Florence Printing Co.,* 158 NLRB 775 (1966) and 145 NLRB 141 (1963).

In no decision prior to the instant one of the Court below has any Court interpreted a reinstatement order of the Board as requiring reinstatement of those whom the Board lacks the power to reinstate, with the result that the Court's enforcement foreclosed the employer from subsequently asserting its rights under 10(c) in defense to the order. To the contrary, at least two Circuits have expressly held the opposite, *Vapor Blast Shop Workers Assoc. v. Simon,* 305 F.2d 717, 719-720 (7th Cir. 1962); *NLRB v. J. H. Rutter-Rex Mfg. Co.,* 245 F.2d 594, 598 (5th Cir.

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3. The misconduct in this case occurred during a strike which ended prior to the hearing on the unfair labor practice charges (see the related decision reported at 133 NLRB 1301).

1957), and other circuits have rendered holdings on related questions which are in direct conflict with the rationalization employed by the Board in its decision below. *NLRB v. Plastilite Corp.*, 375 F.2d 343, 348 (8th Cir. 1967); *NLRB v. New York Merchandising Co.*, 134 F.2d 949, 952 (2nd Cir. 1943). These decisions cannot be reconciled with the instant ruling of the Board or with the decision of the Court below affirming it; nor can they be reconciled with the Board's previous practice of entertaining the misconduct defense in compliance proceedings notwithstanding the fact that its original reinstatement order had received enforcement from a Court. *J. H. Rutter-Rex Mfg. Co., Inc., supra,* 158 NLRB 1414; *Trinity Valley Iron and Steel Company, supra,* 158 NLRB 890; *Cone Brothers Contracting Company, supra,* 158 NLRB 186; *Florence Printing Co., supra,* 158 NLRB 775.

The Board's order in this regard, which the Court below enforced, serves no affirmative purpose or policy of the Act; to the contrary, it seeks to award reinstatement and back pay to those whom the Act expressly declares are not entitled thereto. The order is without precedence or justification, is in conflict with the law as expressed by other Circuits and contravenes the principle of the *Porter* decision by presuming to compel adherence to a remedy the Board is without statutory authority to impose.

III. In Affirming the Board's Modification of Its Original Order So as to Include a Liability for Interest During the Back Pay Period, the Court Below Rendered a Decision in Direct Conflict With the Decisions of This Court and Sanctioned Such a Departure from the Accepted and Usual Course of Administrative Proceedings as to Call for an Exercise of This Court's Power of Supervision.

In the early years under the Act, this Court considered the question of the Board's authority to change the liability

specified in its orders for back pay and held that once the order has been enforced by a Court the Board is without the authority to determine in proceedings subsequent to that enforcement that the back pay liability should be changed from that required by the original order. *International Union of Mine, Mill and Smelter Workers, et al. v. Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335 (1945). That holding by the Court is still the law, yet, in the enforcement proceedings below, the Board increased Petitioner's back pay liability in a substantial amount by ordering that the amount owing for the back pay period included a liability for interest which concededly had not been required by the Board's original order. This aspect of the Board's order was completely novel, but the Board's decision contains no explanation why the Board imposed such an obligation in this case or why the Board had for the first time determined it had authority to do that which this Court in the above-cited decision said it could not do (see, A. 72). Nor did the Court below find occasion to comment on the Board's action; instead, as with the other issues raised in this Petition, the Court treated the Board's action as so well within its authority as not to require specific consideration by the Court.

At the time of its original order in this case the Board was still adhering to the policy it had followed for some twenty-seven years of not including an obligation for interest for the back pay period in its back pay awards. *See, Fibreboard Paper Products Corporation,* 138 NLRB 550, 555 (1962). After its original order in this case, the Board changed its policy and determined that in the future its back pay awards would include an obligation for such interest. *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The Board thereafter expressly included interest for the

back pay period in its remedial orders,[4] but with regard to those orders entered prior to *Isis Plumbing* which did not include interest, the Board considered that it was without authority in subsequent enforcement proceedings to add to the original liability it had ordered by requiring interest for the back pay period, although it did determine, in *International Union of Operating Engineers,* 151 NLRB 972 (1965), that in cases of this nature it could order that interest would accrue from the date of the enforcement proceedings on the amounts determined to be owing and ordered to be paid in those proceedings. *See, e.g. Ellis and Watts Products, Inc.,* 143 NLRB 1269, 1272 (1963); *M. J. McCarthy Motor Sales Co.,* 147 NLRB 605, 618 (1964), *Rice Lake Creamery Co.,* 151 NLRB 1113, 1116 (1965); *Burnup and Sims, Inc.,* 157 NLRB 366 (1966).[5]

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4. *See, e.g., Ellis and Watts Products, Inc.,* 143 NLRB 1269, 1272 (1963); *M. J. McCarthy Motor Sales Co.,* 147 NLRB 605, 618 (1964).

5. An aberration occurred in this line of cases in *American Compress Warehouse,* 156 NLRB 267 (1965), wherein the trial examiner erroneously included back pay interest in his recommended order although such interest had not been imposed by the Board's original order and the Board, in a brief opinion, adopted the examiner's decision. However, the interest question was not considered by the Board in its decision and that decision marked no change in the Board's prior holdings regarding its inability to assess interest in these cases, as demonstrated by the fact that in every such case which came before the Board after *American Compress* the Board applied the rule enunciated in *Operating Engineers* and did not order interest for the back pay period. *See, e.g., Burnup and Sims, Inc., supra; Cone Brothers Contracting Company,* 158 NLRB 186, 188 (1966); *Trinity Valley Iron and Steel Co.,* 158 NLRB 890, 904 (1966); *J. H. Rutter-Rex Mfg. Co., Inc.,* 158 NLRB 1414, 1425 (1966).

On a subsequent appeal, the Board's implied award of interest for the back pay period in the *American Compress* case was affirmed by the 5th Circuit in a short opinion wherein the Court did not consider this Court's decision in *Eagle-Picher* and confused the question of what the Board *would* have the authority to order as a make-whole remedy with the question of what the Board had *in fact* ordered in the original remedial order it had issued in the case before the Court. *NLRB v. American Compress Warehouse,* 374 F.2d 573 (5th Cir. 1967).

The foregoing was the background in which the Board in the instant case ordered, in one sentence, that Petitioner's liability for the back pay period was not limited to the obligations imposed by the Board's original order, but included a further obligation for interest during the back pay period. If it is true that the Board cannot second-guess its remedial orders once they have been enforced by a Court, as this Court held in *Eagle-Picher,* then this holding of the Board was patently in conflict with what this Court has said are the limits of the Boards powers; yet the Court below permitted the Board's holding to stand without a word of comment. The decision of the Court below summarily affirming the Board's order, in addition to being in conflict with the aforecited ruling of this Court, was also in conflict with the decisions of this Court and those of other Circuits holding that judicial enforcement should be denied where an administrative agency has failed to articulate a reasoned basis for its decision. *Burlington Truck Lines, Inc. v. U.S.,* 371 U.S. 156 (1962); *SEC v. Chenery Corp.,* 318 U.S. 80 (1943); *NLRB v. Groendyke Transport, Inc.,* 372 F.2d 137 (10th Cir. 1967); *Northeast Airlines, Inc. v. C.A.B.,* 331 F.2d 579 (1st Cir. 1964).

IV. The Summary Disposition of the Issues by the Court Below in Effect Denied Petitioner Its Right to an Appellate Review of the Board's Action and Constituted Such a Departure from Accepted Judicial Procedures, and the Requirements of Due Process, as to Call for an Exercise of This Court's Power of Supervision.

A Justice of this Court has recently observed that "the courts of appeals, and not this Court, are the watchdogs of the Board."[6] This statement, though it is undeniably correct as a general proposition, presupposes that the courts of appeals will discharge their responsibility to

6. Douglas, J., dissenting in *NLRB v. J. H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 268 (1969).

ensure that the Board remains faithful to the limits of its authority and protect litigants before the Board from orders which dispense punishment or are otherwise in excess of the Board's powers.

The Board's order herein subjected Petitioner to unprecedented liabilities and obligations, with only superficial treatment from the majority of the Court below, whicl dismissed the entire appeal as not raising issues warranting the Court's consideration. The question presented by the Court's treatment of the instant appeal is not merely whether Petitioner suffered unjustifiable liabilities in this case, but whether the Board may exercise its remedial power without the supervision of the courts of appeals, leaving this Court as the only resort for acts of the Board in excess of its power.

It is submitted that, while the courts of appeals may properly be termed the "watchdogs" of the Board, the action of the Court of Appeal in this case constituted such a departure from the accepted responsibilities of the reviewing courts as to warrant an exercise of this Court's power of supervision.

CONCLUSION

We respectfully submit that this petition for certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1569

FIBREBOARD CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

This Court's prior opinion sustaining the Board's unfair labor practice findings and enforcing its order is reported at 379 U.S. 203. The opinion of the court of appeals enforcing the Board's supplemental backpay order (Pet. App. 1-3) is reported at 436 F. 2d 908. The Board's supplemental backpay decision (App. 1-42; A. 57-100)[1] is reported at 180 NLRB

[1] "A." refers to the bound appendix to the briefs in the court below. "App." refers to the separate document captioned Appendix to the Petition and "Pet. App." to the Appendix contained in the Petition.

No. 33; its earlier decision is reported at 130 NLRB 1558 and 138 NLRB 550.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1971, and a petition for rehearing was denied on January 18, 1971 (App. 43-45). The petition for a writ of certiorari was filed on April 10, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the facts of this case, the formula by which the Board computed the company's backpay obligation was a reasonable means of approximating what the employees would have earned in the absence of the company's unfair labor practice.

2. Whether the Board abused its discretion in refusing to consider, in supplemental backpay proceedings, a misconduct defense to reinstatement which could have been, but was not, raised in the initial unfair labor practice proceeding.

3. Whether the Board properly increased the company's backpay liability to reflect interest, even though its original order did not expressly provide for interest.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is set out at Pet. App. 6-7.

STATEMENT

A. The Prior Unfair Labor Practice Proceeding

On July 27 and 30, 1959, just before the expiration of a collective bargaining contract, the Company informed the Union [2]—which had been the exclusive bargaining representative of a unit of 50 maintenance machinists at the Company's plant for 22 years—that it had decided, for economic reasons, to contract out maintenance work. When the contract expired on July 31, the Company terminated its maintenance machinists and an outside contractor took over their duties. The former employees began to picket the plant. 130 NLRB at 1559, 1562, 1567-1571. On August 3, the Company secured a state court injunction against picket line misconduct, and later successfully prosecuted state court contempt charges against three former employees for engaging in such misconduct (App. 12; A. 661, 668).

The Union filed charges with the Board on July 31, 1959 alleging that the Company violated Sections 8(a)(1), (3), and (5) of the Act by contracting out the work without first bargaining with the Union.[3] On September 13, 1962 the Board, reversing its earlier dismissal of the charges (130 NLRB 1558), held that

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[2] Local 1304, United Steelworkers of America.

[3] The unfair labor practice hearing on these charges was held on September 21 and 22, 1959—only two weeks before the state court issued its findings of fact and conclusions of law in the contempt proceedings (App. 12; A. 30, 79; 183, 668). The Company's brief to the Trial Examiner, although submitted long after the state court findings issued, did not mention them (App. 13, n. 39).

the Company had violated its duty to bargain under Section 8(a)(5) of the Act by unilaterally subcontracting its unit work. 138 NLRB 550. The Board ordered the Company to offer the terminated machinists reinstatement and backpay in an amount "based upon the earnings which they normally would receive from the date of this Supplemental Decision * * * to the date of [the Company's] offer of reinstatement." *Id.* at 555 & n. 21.

The court of appeals affirmed the Board's unfair labor practice finding and enforced its order. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 322 F. 2d 411 (C.A.D.C.). This Court also affirmed. 379 U.S. 203. It rejected the Company's contention that the Board's order was beyond its authority since there was no certainty that the Company, had it bargained with the Union, would have retained the former employees. The Court noted the Board's "broad discretionary" power in "devising remedies to effectuate the policies of the Act" and held that there "has been no showing that the Board's order restoring the *status quo ante* * * * is not well designed to promote [those policies] * * * [or] would * * * impose an undue or unfair burden on the Company." *Id.* at 215-217. On January 18, 1965 the Company offered reinstatement to a substantial number of the terminated machinists in accord with the Board's order, thereby fixing the date of its liability for back pay (A. 583; G.C. Exh. 1(k), pp. 1-2).[4]

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[4] The relevant back pay period therefore runs from September 14, 1962, the date of the Board's second decision, to January 18, 1965 (App. 2, n. 2; 138 NLRB at 555, n. 21).

B. The Backpay Proceeding

In the supplemental proceeding to determine the company's back pay obligation, the Board adopted the "Pabco Wage Formula" as a means of approximating what the unlawfully terminated employees would have earned. The Board found that from 1937 to 1959 the Company's maintenance work had been performed by a discrete unit of Union machinists plus "a few" millwrights who were represented by another union, the ILWU (App. 3 n. 3; 130 NLRB at 1559). The collective bargaining agreements in effect since August, 1951 provided that the machinists' wages would be computed by the Pabco formula. According to this formula, machinists were to be paid 12.5 cents per hour less than the prevailing building and construction crafts scale. (App. 2-3; A. 548-549, 634, 695). During the same period, the ILWU millwrights automatically received the same pay as the machinists; their wages were not independently negotiated. (App. 3; A. 129, 552).

After the Company unlawfully terminated its Union machinists, ILWU millwrights retained two of the 21 available unit jobs. The millwrights did not bargain for or receive any wage increase until 1961, when they were given the wage rates received by the Company's production workers (App. 3-4; A. 14-19, 66-70 & nn. 13-14; 293, 301-304, 552-562).[5] The other

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[5] The Company's production workers, who were represented by the ILWU, consistently received lower hourly wages than did the machinists. Thus the production workers scale between September, 1962 and June 1965 increased from $3.695 to $3.985 (App. 4, n. 5; 37-39, n. 28; 31; A. 129, 133, 557-

19 unit jobs were taken over by the outside contractor's employees, who were paid the prevailing building and construction crafts scale throughout the period, or 12.5 cents per hour more than the terminated Union machinists would have received under the Pabco formula (App. 3-4, n. 6; A. 66-70, 108-109, 121-128, 278-288, 295-298, 333-336, 496-497, 569-581). When the Union machinists accepted the offer of reinstatement and returned to work in March 1965, they received an interim wage rate pending negotiations. In July, they accepted a collective bargaining contract which provided a $4.00 hourly wage—80 cents per hour less than the Pabco formula would have yielded. (App. 8; A. 469-479.)

The Board concluded on these facts that the Pabco wage formula, in effect for the eight years preceding the machinists' discharge, "provided the most reasonable, acceptable, and objective approximation of what the backpay claimants would have received" but for their unlawful termination (App. 11; A. 58-60, 65).[6]

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562). The prevailing scale in the building and construction crafts increased from $4.40 to $4.925 during the same period. Under the Pabco formula, therefore, the machinists would have received $4.275 between September 14, 1962 and July 31, 1963; and $4.505 between August 1, 1963 and January 18, 1965, when the offer of reinstatement was made (App. 4 A n. 6; 27, n. 9; A. 130).

[6] The Board reversed its Examiner who had held that the wages paid the two ILWU millwrights during the backpay period provided the proper basis for approximating backpay. The Board found that the Examiner's holding was premised on the erroneous assumption that the January 1965 hourly rate of the independent contractor's employees was the same as the ILWU millwrights, instead of 63 cents higher (App. 5-7; 35, n. 23; A. 129-130, 133, 559-562).

The Board therefore ordered the Company to pay the discharged machinists what they would have received under the Pabco formula during the backpay period (App. 11, 19-20).[7]

The Board refused to consider the Company's newly-raised defense that three of the employees should be denied back pay because of picket line misconduct occurring in August 1959. It held that the defense was untimely because the Company had full knowledge of the facts prior to the original unfair labor practice hearing and could have raised it and had it determined with finality in that proceeding (App. 12-18). The Board also ordered the Company to pay interest on its backpay obligation, even though its original unfair labor practice order did not include an interest requirement (App. 39-40).

The court of appeals (District Judge Matthews dissenting) sustained the Board's findings and enforced its backpay order (Pet. App. 2-3).

ARGUMENT

1. Petitioner's primary contention is that the Board exceeded its remedial authority under the Act by imposing on it a contract term to which it would not have voluntarily agreed (Pet. 10-15). The Board, however, decided only the amount of back pay which was due employees who had been unlawfully discharged. The measure of back pay is a conventional

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[7] More specifically, the Board ordered the Company to pay a total of $330,931.95 to 36 employees (App. 19-20).

factual issue with which the Board frequently deals [8] and which does not warrant review by this Court. The record, moreover, supports the Board's conclusion that the Pabco formula, rather than the rates paid during the back pay period to the Company's few ILWU millwrights or some other standard, provided the most reasonable basis for estimating the wages machinists would have received but for their unlawful termination.[9]

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[8] *E.g., National Labor Relations Board* v. *Rice Lake Creamery Co.*, 365 F. 2d 888, 891 (C.A. D.C.); *National Labor Relations Board* v. *Charley Toppino & Sons, Inc.*, 358 F. 2d 94, 97 (C.A. 5); *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447, 452 (C.A. 8). See *Palmer* v. *Connecticut Rway. & Lighting Co.*, 311 U.S. 544, 561.

[9] The Board rejected use of the wage rate paid ILWU millwrights essentially because they had never bargained independently (always receiving the rate paid machinists) and did not bargain after the machinists were terminated, possibly because of that termination (App. 7-8). It considered the Pabco formula more accurate than prevailing rates paid other machinists in the area because the Company had consistently paid a higher wage, based on the Pabco formula, than other area employers (App. 7, n. 10; A. 481, 635, 737).

The Board also stressed the fact that the employees of the outside contractor who replaced the machinists were paid 12.5 cents an hour more than the machinists would have received under the Pabco formula (App. 6; A. 130, 569-581). It minimized the significance of the wage rate agreed upon by the parties after this Court's decision, which was 80 cents less than the Pabco rate and approximately the same as the rate paid ILWU production workers. The Board concluded that the posture of negotiations leading to this agreement—pitting a union, seriously weakened by being off the job for six years, against a company "determined to preserve the savings it had achieved through its unlawful" conduct (App. 8; A. 471-472, 549-550)—prevented this figure from being an accurate estimate of the rate which would have been agreed upon in earlier bargaining (App. 9).

This is not a case like *H. K. Porter* v. *National Labor Relations Board*, 397 U.S. 99, where the Board sought to remedy the employer's unlawful refusal to bargain by requiring him to accede to a term in the collective bargaining agreement which was the subject of attempted negotiation and which he had refused to discuss. The fundamental controversy here —whether the Company had committed an unfair labor practice by contracting out its maintenance work without first bargaining with the Union—was settled adversely to petitioner by this Court's earlier decision. The remedy for its unlawful refusal to bargain included reinstatement and back pay pending bargaining with respect to contracting out the maintenance work. The only remaining question was the amount of back pay. To effectuate its order, it was necessary for the Board to impose some standard for determining back pay, and it chose, reasonably, to adopt the formula which the Company and Union had employed for the past eight years.[10]

Nor does the decision below conflict with *Cooper Thermometer Co.* v. *National Labor Relations Board*, 376 F. 2d 684 (C.A. 2) (Pet. 13-14). The facts in

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[10] Similarly, *Ex-Cell-O Corp.*, 185 NLRB No. 20, 74 LRRM 1740, is inapposite. The Board there held that it lacked power, as a remedy for the employer's illegal refusal to recognize and bargain with the union, to compensate the employees for the value of the union representation which they were unlawfully denied. In the Board's view, such a remedy would, like the one invalidated in *Porter*, compel the Board to write a contract for the parties. For, "there is no basis for such a remedy unless the Board finds, as a matter of fact, that a contract would have resulted from bargaining." 74 LRRM at 1743. Here, as noted, the contract formula had existed for many years.

that case were very different and were more complex than those present here. The Company in *Cooper Thermometer* decided, for economic reasons, to relocate its plant. The Board held that the Company had committed an unfair labor practice by refusing to bargain with the Union regarding conditions of transfer to the new plant. It ordered the Company to offer employees of the old plant reinstatement to equivalent positions at the new plant without loss of seniority and ordered back pay, for those who transferred, based on the wage rates under the contract at the old plant. The court upheld the Board's ruling that the company had committed an unfair labor practice and agreed that reinstatement and back pay were appropriate. But it refused to enforce the Board's "little illumined" order (376 F.2d at 685) regarding the conditions of reinstatement or the rate for back pay, concluding that these provided a less accurate approximation of what agreement would have been reached than would current good faith bargaining regarding these matters. The court stressed the difficulty of determining, in light of additional factors such as the distance of the new plant, which employees would have transferred. It stated that back pay on the basis of the old contract terms would "hopelessly complicate" that determination by providing a powerful incentive to transfer. 376 F. 2d 691. Under the simpler facts of this case, there are no such problems concerning the Board's decision, which was a carefully considered and reasonable estimate of the wage rate which would have been adopted as a result of earlier bargaining. Indeed, the court in *Cooper Thermometer*

itself noted that the greater complexity of that case "sufficiently distinguishes the decisions enforcing back pay orders for failure to bargain over subcontracting" (*ibid.*).

2. The Company further argues (Pet. 15-19) that the Board abused its remedial power by refusing to consider the Company's defense, first raised in the supplemental proceeding, that three terminated machinists should be denied reinstatement and back pay because of picket line misconduct which antedated the original unfair labor practice hearing. This issue was also correctly decided below and does not warrant review by the Court. The Board has frequently, and properly, exercised its discretion to require an employer to raise such a defense in the initial proceeding in circumstances, such as these, where the Company had knowledge of the underlying facts and was on notice that reinstatement and back pay were in issue. *National Labor Relations Board* v. *Mastro Plastics Corp.*, 261 F. 2d 147, 148 (C.A. 2); *National Labor Relations Board* v. *Lambert*, 211 F. 2d 91, 94 (C.A. 5). See also *National Labor Relations Board* v. *Louisiana Industries, Inc.*, 414 F. 2d 227, 228 (C.A. 5), certiorari denied, 396 U.S. 1039; *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37.[11]

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[11] The cases the Company cites (Pet. 17-19) do not support its assertion that the Board has consistently permitted misconduct defenses to be raised for the first time in supplementary proceedings. Those cases involved either no objection to the untimely raising of the defense at the back pay stage (cf. A. 80, n. 44), or timely raising of the defense in the unfair labor practice proceeding and the Board's election, in its sound discretion, to defer it.

3. There is, finally, no merit to the Company's argument that the Board lacked power to assess reasonable interest on the backpay award because its original remedial order did not expressly provide for interest (Pet. 19-22). The Board has discretion, in supplemental proceedings, to assess interest on a backpay obligation despite the silence of its original order or of the court decree enforcing it. See *Local 138, Int'l Union of Operating Engineers (Nassau & Suffolk Contractors' Assoc.)*, 151 NLRB 972, 974, enforced in this respect, 380 F. 2d 244, 254 (C.A. 2); *Lozano Enterprises*, 152 NLRB 258, 260, n. 8, enforced, 356 F. 2d 483 (C.A. 9); *National Labor Relations Board* v. *American Compress Warehouse*, 374 F. 2d 573, 575 (C.A. 5). As the Fifth Circuit stated in *American Compress, supra:* "The supplemental orders may not 'enlarge upon' or be 'inconsistent with' the terms of the Court's enforcement decree. The interest award does neither, for it simply conforms to the Board's original order that the employer make the discharged employees whole for any loss of pay suffered by reason of the discrimination against them." [12] The assessment of interest was not unreasonable here. The Company was aware of the Board's new policy respecting interest for virtually the entire backpay pe-

[12] The interest award here does not conflict with this Court's decision in *Int'l Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Mining Co.*, 325 U.S. 335, which merely held that the Board could not enlarge its backpay formula for determining the employer's basic liability after it had been enforced by the court and the employer had attempted to comply. No compliance effort was made here, nor was the Company's basic liability changed.

riod and could have terminated its liability at any time by offering the claimants suitable reinstatement.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1971.

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[13] The Board's decision announcing the assessment of interest on all future backpay obligations issued September 19, 1962. *Isis Plumbing & Heating*, 138 NLRB 716. The decision finding the Company's unilateral action an unfair labor practice and directing reinstatement and back pay issued September 13, 1962, effective the next day. 138 NLRB 550, 554-557. The Company thus was on notice of its possible liability for interest five days after the backpay period began to run.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 1569

FIBREBOARD CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, UNITED STEELWORKERS OF AMERICA, AFL-CIO

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STEELWORKERS OF AMERICA, AFL-CIO IN OPPOSITION

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BRIEF FOR THE UNITED STEELWORKERS OF AMERICA, AFL-CIO[1] IN OPPOSITION

The opinions below, jurisdictional statement, questions presented and the provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq*) germane to the instant petition are set forth in detail in the Board's brief in opposition to be filed simultaneously herewith. As amply demonstrated in the Board's brief in opposition, there is plainly no basis for granting the petition for a writ of certiorari insofar as the Company contends either that: (1) the Board exceeded its authority by adding a sum for interest to the Company's backpay liability even though its original remedial order did not so provide expressly; or (2) the Board abused its discretion in refusing to consider, in this supplemental backpay proceeding, a defense that alleged employee misconduct precludes reinstate-

[1] Hereinafter "the Steelworkers" or "the Union."

ment where this defense was not, but could have been, raised in the initial unfair labor practice proceeding. No worthwhile purpose would be served by the Steelworkers independently elaborating on the Board's position concerning these issues.

1. However, we do feel constrained to express our views concerning the Company's attempt to invoke this Court's reviewing authority based on a broad scale attack on the Board's exercise of its remedial powers in the instant circumstances. The Company's petition furnishes a convenient point of departure; at pp. 10-11 thereof the Company argues essentially that the formula by which the Board computed the Company's backpay obligation was at odds with this Court's prior holding in this very case (379 U.S. 203).

On the contrary, as we show below, close examination of the Company's position reveals that it is *now* in the untenable posture of seeking certiorari predicated on the very substantive arguments which it previously raised and this Court expressly rejected when the Company last stood before it. Thus, as found by the Board,[2] the Company engaged in an illegal refusal to bargain when in July 1959—just before its current contract with the Steelworkers was due to expire—it unilaterally contracted out the maintenance work formerly performed by approximately 50 employees in the bargaining unit represented by Steelworkers.

Although the Board found this decision was motivated only by economic considerations, the Board not only issued the traditional order requiring the Company to bargain prospectively but also ordered a restoration of the *status quo* as of the date of the initial refusal to bargain—i.e., the Board ordered the Company to resume its maintenance operations and offer the terminated machinists reinstatement and backpay to make them whole for lost earnings

[2] 138 NLRB 550.

resulting from their unlawful termination.[3] The Court of Appeals for the District of Columbia Circuit enforced the Board decision and order.[4]

Significantly, in attempting to persuade this Court not to enforce the Board's order, the Company argued vigorously in 1964 (br. pp. 42-46) that the order was "punitive" and in excess of the agency's power precisely because it was being required to resume an uneconomical maintenance operation in circumstances where it was not at all certain that the Company would have agreed to such resumption even *if* it had satisfied its statutory duty to bargain with the Union concerning the contracting out of this work. In this connection, the Company's 1964 brief speaks for itself:

> "Nor is there any basis in the record for the Board's assertion that 'the loss of employment stemmed directly' from the refusal to bargain. That assertion assumes that bargaining would have resulted in abandonment by Petitioner of its plan to contract out the work. The Board might with equal justification have assumed that bargaining would have resulted in acceptance by Petitioner of the Union's wage and other demands. There was no more warrant for the Board's assumption that bargaining would have resulted in abandonment of the plan to contract out the work than there was for a similar assumption which caused this Court to overturn a Board order in the completely analogous

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[3] The Board limited the Company's backpay obligation to an amount "based upon the earnings which they normally would receive from the date of [its decision] . . . to the date of [the Company's] offer of reinstatement." 138 NLRB 550, 555 and n. 21. Simply put, had the Company complied with the Board's order entered on September 13, 1962, it would not have been faced with any backpay obligation. Instead, however, it chose to defy the order. As a result in the ensuing two year period its backpay liability built up while its legal arguments failed—first before the Court of Appeals (322 F.2d 411) and then this Court (379 U.S. 203).

[4] 322 F.2d 411.

> case of *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197 (1938)." (Co. brief p. 44)
>
> . . . "*Speculation* . . . that bargaining would have had one outcome [a new contract with Steelworkers] rather than another [implementation of the Company's decision to contract out its maintenance operation] is, we submit, not a proper basis for a Board order" (Co. brief p. 46) (Emphasis added) . . . "The requirement that bargaining be preceded by a resumption of operations which had been abandoned as too costly and by reinstatement with back pay of employees who had been terminated because their services were no longer needed is, we submit, punitive." (*ibid.*)

Plainly, then, in determining whether to enforce the Board's order this Court was directly confronted by the Company's above-quoted contentions that enforcement should be denied because the order rested on "speculation" as to what would have happened in bargaining. This argument was expressly rejected. Thus, the Court stated (379 U.S. at 215-216):

> "The only question remaining is whether, upon a finding that the Company had refused to bargain about a matter which is a statutory subject of collective bargaining, the Board was empowered to order the resumption of maintenance operations and reinstatement with back pay. We believe that it was so empowered. . . ."
>
> "That Section [10(c)] 'charges the Board with the task of devising remedies to effectuate the policies of the Act.' *Labor Board* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* '[T]he relation of remedy to policy is peculiarly a matter for administrative competence. . . .' *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 194. 'In fashion-

ing remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience.' *Labor Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co.* v. *Labor Board,* 319 U.S. 533, 540. Such a showing has not been made in this case."

"There has been no showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act. Nor is there evidence which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company."

In sum, an integral part of this Court's decision was its recognition that the Company would thereby be required to resume its maintenance operations and reinstate its employees with backpay—notwithstanding the Company's explicit claim that said operation was "too costly" and had it negotiated with the Steelworkers it would *not* have abandoned its plan to contract out this work. The lone issue left unresolved by the decision of this Court was the amount of backpay each employee was entitled to receive covering the period from September 13, 1962, to January 18, 1965, when the Company offered reinstatement.

Pursuant to its customary procedures, the Board thereafter determined this in the instant supplemental backpay proceeding. The formula utilized in an effort to approximate what the backpay claimants would have received absent their unlawful termination was the so-called "Pabco" wage formula. The reasonableness of that formula was reflected, *inter alia,* by the fact that it had been in effect for the eight year period immediately preceding the machin-

ists' discharge in July 1959 (A. 58-59, 548-549, 624, 695. "A" references are to the bound appendix to the briefs in the court below).

Accordingly, this entire matter should have been put to rest—as indeed the court below so held (436 F.2d 908). For under settled law where, as here, the employer's unfair labor practices have made it difficult to determine precisely the amount of backpay due ". . . the Board may use as close approximations as possible and may adopt formulas reasonably designed to produce such approximations . . . [W]ith respect to the formula . . . which the Board may deem necessary to devise in a particular situation, [judicial] inquiry may ordinarily go no further than to be satisfied that the method selected cannot be declared to be arbitrary or unreasonable in the circumstances involved" (*NLRB* v. *Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir.)). Accord: *NLRB* v. *Rice Lake Creamery Co.*, 365 F.2d 888, 891 (CADC); *NLRB* v. *Charley Toppino & Sons, Inc.*, 358 F.2d 94, 97 (5th Cir.); *NLRB* v. *Ellis and Watts, Inc.*, 344 F.2d 67, 69 (6th Cir.); *Buncher* v. *NLRB*, 405 F.2d 787, 790 (3rd Cir.) (*en banc*), cert. denied, 396 U.S. 828.

Now, however, six and one-half years after the initial *Fibreboard* decision by this Court, the Company is attempting to relitigate the very argument which, as explained above, was already expressly rejected. For the crux of the Company's argument for granting the writ here (br. pp. 10-11) is that is was speculative and, in turn, punitive for the Board to utilize the Pabco formula in assessing backpay where there was no certainty that the parties would have agreed to this wage scale if the negotiations had occurred. The short answer is that this argument is essentially an unchanged version of the position it urged in its previous abortive attempt to preclude enforcement of the Board's initial order requiring a resumption of the maintenance operations and reinstatement with backpay. The earlier *Fibreboard* opinion of this Court is plainly the law of the

case and there is no possible basis for granting the Company's petition on the grounds of an alleged conflict between that decision and the Board's instant supplemental backpay order.

Indeed, the Company's argument proves too much. Of necessity, once this Court affirmed the Board's initial order this meant that in a subsequent backpay proceeding the agency would have to try to ascertain what the employees *would have* received absent any refusal to bargain. This necessarily meant that the Board's backpay award could be challenged as "speculative." That is, irrespective of whether the Board applied the Pabco formula, or instead awarded backpay commensurate with the wages paid to two millwrights employed by the Company during the backpay period (the formula favored by the Company) or, indeed, chose any other method of computation—it was engaged in the speculative task of attempting to estimate on some rational basis what the employees would have received.

Thus, the real source of the Company's present dissatisfaction with the speculative nature of the backpay award derives from the opinion of this Court enforcing the Board's initial order, not the supplemental backpay proceeding. And surely it is too late in the day for the Company now to challenge this Court's original decision.

2. Nor is there any basis for granting certiorari on the grounds that a conflict exists between the Board's instant decision and *Ex-Cell-O Corp.*, 185 NLRB No. 20, 74 LRRM 1740. There, the Board held (in a 3-2 decision) that it lacked the statutory power to require a company to compensate employees for monetary losses incurred as a result of its unlawful refusal to recognize and bargain with the Union. Obviously, the *Ex-Cell-O* case represents a very important doctrinal decision which will have recurring and widespread application; whereas the instant case turns on its peculiar facts which are non-recurring in nature.

It may be that the instant case is distinguishable from

Ex-Cell-O because here the unfair labor practice resulted in the loss of jobs of employees which naturally triggered the need for a backpay remedy whereas in *Ex-Cell-O* the employees were denied the fruits of the monetary benefits flowing from collective bargaining but not their employment. See also, the opinion of Judge MacKinnon, concurring in part and dissenting in part, in *IUE* v. *NLRB (Tiidee Products, Inc.),* 426 F.2d 1243, 1255-1256 (CADC). If this be so, then clearly there is no warrant for the Court to invoke its reviewing authority here.

Further, there are compelling reasons why this Court should deny certiorari here, even if the Board's *Ex-Cell-O* doctrine *did* conflict with its decision in the instant backpay proceeding. At this juncture, *Ex-Cello-O* is a judicially discredited doctrine. On March 19, 1971, the Court of Appeals for the District of Columbia Circuit, on motion of the petitioning union involved therein, granted summary reversal and remanded the case to the Board. *Auto Workers* v. *NLRB (Ex-Cell-O Corp.),* —— F.2d ——, 76 LRRM 2753. In essence, the Court held that as a matter of law the Board erred in concluding that it lacked authority under Section 10(c) of the Act to award "make-whole" compensation to employees for a period of an unlawful refusal to bargain.[5] In so holding the court relied heavily upon this Court's decision in *Fibreboard.*[6] Thus, the court below

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[5] The Court concluded (*supra* at 2754) that the Board should exercise its discretion in determining whether "make-whole" compensation is appropriate in particular circumstances and, in doing so, it could well draw a distinction between a refusal to bargain based on a challenge to an election which raises a "debatable question" and a clearly unjustified refusal resting on a challenge to an election "palpably without merit." See also, *IUE* v. *NLRB (Tiidee Products Inc.), supra.*

[6] See *Tiidee, supra,* 426 F.2d at 1248-1249 where the court below cites *Fibreboard* (379 U.S. at 216) to support the conclusion that the broad scope of the Board's remedial powers belies its claim in *Ex-Cell-O* that the Act precludes it from fashioning a compensatory "make-whole" remedy an unlawful refusal to bargain case.

has already removed the potential conflict. By affirming this case and reversing *Ex-Cell-O,* it has implemented the rationale of *Fibreboard* in both cases.

Finally, if the Board determines not to accept the remand in *Ex-Cell-O,* it must petition for a writ of certiorari. If it does so the question whether this Court will review that doctrine would be presented through the appropriate vehicle—the *Ex-Cell-O* case itself—rather than indirectly in the context of the unique and non-recurring facts presented in this proceeding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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OCTOBER TERM, 1970

No. 1569

FIBREBOARD CORPORATION,
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vs.

NATIONAL LABOR RELATIONS BOARD, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

Reply Memorandum in Support of Petition for Writ of Certiorari

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Respondents.

Reply Memorandum in Support of Petition for Writ of Certiorari

The purpose of this memorandum is to call to the Court's attention a very recent decision of the Second Circuit Court of Appeals and to correct certain erroneous factual statements in the brief filed by the Solicitor General.

The Incorrect Factual Statements.

The erroneous treatment of the facts is to be found at page 5 of the Solicitor General's brief. It is there stated that the ILWU millwrights did not bargain for or receive any wage increase until 1961, at which time they were given the rates paid the ILWU production workers. This statement is

in error in two respects. First, in the period between the terminations in 1959 and the receipt of increases by the ILWU millwright in 1961, there were in fact discussions between Fibreboard and the Union in which discussions Fibreboard took (and maintained) the position that the millwright rates were "too high" (A. 541-544).* The Trial Examiner refused to credit the Union's testimony that the millwrights did not receive an increase during these two years because the business agent simply "forgot all about them" during this period (App., p. 37, n. 27)‡ and the Board did not disturb the Trial Examiner's findings in this regard. The second error is in the statement that in 1961 the ILWU millwrights were given the *same* rates as the Company's production workers, who were also represented by the ILWU. There was never any dispute over the fact that, while in 1961 and subsequent years the millwrights received the same *percentage* increase as the production workers, this increase was credited to a higher base rate of pay (*cf.*, A. 554-555; 562-564).

The Recent Conflicting Decision of the Second Circuit.

In the recent case of *William J. Burns International Detective Agency, Inc. v. NLRB,* 39 Law Week, page 2628 (April 26, 1971), the Second Circuit rendered a decision which further emphasizes the conflict between it and the Court below. The Court there held that the Board is without authority to order a "successor" employer to honor a collective bargaining contract agreed to by its predecessor for to do so would be to impose an agreement "upon an unwilling party" contrary to this Court's decision in *H. K. Porter Co., Inc. v. NLRB,* 397 U.S. 99 (1970). The Court below held

*Appendix to the briefs filed with the Court below.

‡Separate Appendix to Petition for Writ of Certiorari.

precisely the opposite in affirming an order of the Board which imposed contractual wage rates despite Fibreboard's demonstrated unwillingness to agree thereto.

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